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IN THE

Supreme Court of the United States

JAY NOLAN RENOBATO

Petitioner,

v.

MERRILL LYNCH & CO., Underwriter
MERRILL LYNCH PIERCE FENNER & SMITH INC., Broker, *and*
MERRILL LYNCH PROFESSIONAL CLEARING CORPORATION,
Clearing Agent

Respondents,

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION [APPEAL] FOR A WRIT OF CERTIORARI

J. NOLAN RENOBATO
Arbitrageur of Record
RENOBATO & ASSOCIATES
Post Office Box 9771
The Woodlands, Texas. 77387
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QUESTIONS PRESENTED FOR REVIEW

1. Certified Federal Questions in Billion Dollar LBO Takeover Diversity Suit. Commonly labeled as a federal question, meeting both diversity of citizenship and amount in controversy requirements, the Renobato versus Merrill Lynch & Co., Merrill Lynch Pierce Fenner and Smith Inc., and Merrill Lynch Professional Clearing Corporation case arises under dual federal treatise including the Constitution and Acts of Congress, and involves their appropriate application to SEC recorded title to property deeds as well as liberty of 'purchase' and 'sale' contracts at issue within the free trade and open market system of the United States, of which statutory jurisdiction proper is given to federal courts at all levels. (*See* U.S. CONST. art. III, § 1, 2; 28 U.S.C. §§ 1251, 1292, 1331.)

(a) Bona Fide Arbitrage in Interstate Commerce. Whether guarantees enumerated in the Constitution of the United States protect Petitioner's life occupation as an arbitrageur from a Clerk of the Court of Appeals seizing purported inherent authority to issue commercial paper; (1) denying equal protection to a member of a legislatively protected class of public investors in securities interstate commerce wherein zero fair play or substantial justice was afforded for due process during the sentencing phase subsequent to the finding of total culpability and absolute liability of Respondent (convicted in a binding unanimous Judgment on all counts of complaint at NYSE trial), (2) against established case precedent, and (3) that is violative of free speech where the Clerk's so-called 'order'[sic]'fundamentally refused to permit prosecution to plead its case in redressing grievances in the federal court system to affirmatively recoup damages and enjoy property ownership? And does the Bill of Rights incorporate provisions that the Claimant is empowered to use and rely on in seeking enforcement of Judgment and securing property entitlements in a court of last resort?

(b) Statutory United States Code, and Code of Federal Regulations Application. Whether, in particular terms, convicted fraud Respondent is brought to face its clear liability in courts of the United States or is permitted to escape capital market obligations for certain felonious commissions and/or omissions of acts that maliciously breach definitive trade customs, contract duties, and securities rules promulgated under federal code appurtenant principally to Commerce and Trade legislation, a Securities and Exchange Commission order, and a National Securities Exchange mandate? (15 U.S.C. § 77, 78; 17 C.F.R., & Reg T)

PARTICIPANTS TO THE PROCEEDING

2. Natural Person Claimant v. Artificial Person Respondent. The only real parties ('entities'[sic]) in interest concerning Renobato v. Merrill Lynch *et al.* now pending before the United States Court of Appeals for the 5th Circuit are listed in the caption. The petitioner is Jay Nolan **Renobato**, a U.S. citizen, resident of the State of Texas, sole proprietor, and arbitrageur who advances ***pro se***. The convicted Respondent is manipulative broker-dealer **Merrill Lynch Pierce Fenner and Smith Inc.** a subsidiary, along with negligent clearing agent Merrill Lynch Professional Clearing Corp., both inside parent hegemonic underwriter Merrill Lynch & Co.- all Delaware Corporations. In the courts below, Renobato is called Plaintiff, Claimant, Appellant, and Judgement creditor; whereas the Merrill Lynch is properly referred to as the Defendant, Respondent, Appellee, and Judgement debtor. The interstate commerce controversy subject matter stands on transactions and occurrences originating between Texas, Delaware, New York, and New Jersey where the Defendants nexus of operations have minimum branch-office contacts, were incorporated, are physically headquartered, and maintain executive offices. In addition to those listed on the cover, accessory defense attorneys intentionally misrepresent that there is no company named "Merrill Lynch Professional Clearing Corporation." (18 U.S.C. §§ 1341, 1343) Fraudfeasor Defendants, however, are in fact a combination parent and multi subsidiary[1] pyramid organization. (TX. DTPA §27.46(20)) Also, note that the Government is a participant in a high proportion of litigation in the Supreme Court.[2]

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1. According to the Secretary of State for the State of Delaware, Merrill Lynch & Co. is in fact the parent of Merrill Lynch Professional Clearing Corporation. (*See infra.*)
2. The statistics for any Term[sic] can be found in the Annual Report of the Solicitor General, which is printed as a part of the Annual Report of the Attorney General.

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TABLE OF CODES, STATUTES, AND RULES*

* the cited sections are not intended to be an exhaustive listing of all applicable laws or regulations, but are simply referenced to illustrate certain provisions that Respondent is in violation of.

Secondary Sources:

PETITION FOR A WRIT OF CERTIORARI

ONE SOLE PROPRIETOR Jay Nolan Renobato, an equity security arbitrageur, rightly comes forward to respectfully enjoin, dutifully appeal, and firmly call for such *Writ of Certiorari* to issue from the Supreme Court in plenary review of legal papers of a Clerk and other seeming federal Judges as assigned initially in territorial venues situated within the United States of America in conjunction with the Constitution, Commerce and Trade, and Investment Banking laws.

ORDERS BELOW STANDING VERSUS STATUTE AND CASE LAW

I. Fifth Circuit. On 9 August 2005 the Office of the Clerk in the 5th Circuit constructed, docketed, and filed a document representing apparent nation-state action that creates a split of decisions between the 11th and 5th Circuits regarding securities entitlements and legal rights in the ongoing controversy on securities exchanges. (*See* U.S. C.A. Clerk's *so-called* 'order'[sic] *of* 9 Aug. 2005- [Pet. App. 3a]; *and compare Gund v. First Florida Banks*, 726 F.2d 682 (1984) [Pet. App. 65a].) Deputy Clerk Shirley Engelhardt's overlying 'Memo'[sic] cover letter verifies discretionary abuses, as well as substantive mistakes and procedural errors within the four-corners of such instruments, whereas the actual underlying anonymous "PER CURIAM"[sic] paper is unsigned by any real Judges sitting ***en banc*** in the United States Court of Appeals for the Fifth Circuit and is therefore rendered void under customary Federal Rules of Civil Procedure. (*See* FED.R.CIV.P. Rules 11, 35; 5th Cir. Rule 27; *and* [Pet. App. 4a].) In the lower case numbered 04-20737, a government agent h. instructed that the pleadings stage here cease and that prosecution not press any further charges outlining Appellee's egregious law violations. (*See* 5th Cir. "order" *of* 9 August 2005, ***infra***.) Log also that the 5th Circuit did not affirm the United States District Court's ruling and likewise did not contain findings of fact, lines of reasoning, conclusions of law, or conform to the evidence in the record, but merely narrowed the issues on appeal. (FED.R.APP.P. Rule 10(b)(2)) Additionally, no sustainable MANDATE has been rendered by any Court appurtenant to any oral argument[3] on damages, sentencing, or final judgment in a legal forum of the United States of America.

II. Southern District of Texas. The original federal securities lawsuit numbered H-98-0360 was commenced under seal in United States District Court on 6 February 1998 in the Southern District of Texas.

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3. Petitioner is of the position that no formal Court 'hearing' on punitive damages or verbal contest regarding sentencing the incriminated Merrill Lynch Defendants has taken place, and that the full 5th Circuit sitting 'En Banc' has not auditorily participated in any such scheduled argument or Court "Order". (5th Cir. Rule 34)

(*See* Record; *and* 15 U.S.C. §§ 77, 78.) As indicted, underwriter Merrill Lynch & Co., broker-dealer Merrill Lynch Pierce Fenner and Smith Inc. ('MLPF&S'), and clearing agent Merrill Lynch Professional Clearing Corporation ('MLPCC')- all part of a racketeering influenced and corrupt organization, were indeed found guilty of federal securities law violations through "Alternative Dispute Resolution" ('ADR') procedures that used a panel of experts assembled by the New York Stock Exchange Inc. (hereafter 'the NYSE,' 'the Exchange' or 'the Street') to try the counts of complaint as ordered by the District Court Judge. (*See* NYSE Trial, *below*.) Thereafter, Federal Judge Vanessa D. Gilmore has twice breached a "Right to Reinstate" clause contained in a signed "Order" of 10 June 1998. (*See* U.S.D.C. SDoT 'ORDER' *of* 10 June 1998 (Instrument #27)- [Pet. App. 5a]) Also, the same Judge committed plain error in a written 'Order' issued 29 January 1999 mistakenly interpreting the NYSE Judgement damage elements by honoring only the $3,900 profit margin on a $8,250.[15] contract of sale in the first of a series of scheduled 'GTC' trades resulting in expected damages of $7,500,000. (*See* U.S.D.C. 'ORDER' *dated* 29 January 1999 (Instrument #45)- [Pet. App. 9a]; *and compare* NYSE Arbitration #1997-006647 Judgment 'Claim Data' [Pet. App. 11a]; FED.R.CIV.P. Rule 58; NYSE Rules 13, 180, 291; *and State ex rel. Smith v. Smith*, 197 Or. 96, 252 P.2d 550) Objectively, a careful reading and proper business translation of the NYSE trial Transcript by the Honorable Vanessa Gilmore concerning such damages, as awarded in the Judgment "instrument which is their award," proves that Chairperson Fidler in fact intended that the $7,500,000 amount be given full effect. (*See* NYSE Arb. #1997-006647 Judgment *of* 25 November 1998 [Pet. App. 12a]; NYSE Arb. #1997-006647 Transcript p. 67 [Pet. App. 15a], NYSE Arb. #1997-006647 Tr. p. 198 [Pet. App. 17a]; *and compare* U.S.D.C. SDoT 'ORDER' *of* 29 January 1999 (Instrument #45) [Pet. App. 9a] *attached hereto*.) Again, to restate, this independent action for institution of corrections is judicially compelling as the 5th Circuit vacated all acts of the Houston Division. The interlocutory order of the Appeals Clerk and rulings of the District Judge entered in the case are unreported. (*See* FED.R. CIV.P Rule 53(e); *and State v. Fenster*, 2 Conn.Cir. 184, 199 A.2d 177)

RIGHTEOUS NATIONAL SECURITIES EXCHANGE DECISION

III. NYSE Trial. The Self-Regulatory Organization ('SRO') New York Stock Exchange Inc. (of which Merrill Lynch is a member), issued its decision on the merits on 25 November 1998 wherein said Defendant was convicted in a unanimous Judgment on each and every count of complaint. (*See* 15 U.S.C. § 78q(d); FED.R.CIV.P. Rules 48, 50; NYSE

Arb. #1997-006647 Judgment [Pet. App. 11a]; *and Smoky Greenhaw Cotton Co. v. Merrill Lynch Pierce Fenner & Smith Inc.*, 785 F.2d 1274 (5th Cir. 1986), *on remand*, 650 F.Supp. 220 (W.D. Tex.1986).) First and foremost, as a National Securities Exchange established under the Securities Exchange Act, the NYSE is responsible[4] for surveillance and policing of the U.S. financial markets and has for its object and purpose- to maintain high standards of commercial honor and integrity among its members, and to promote and inculcate just and equitable principles of trade, which is what the Street carried out in finding that the guilty Respondents willfully perpetrated fraud, market manipulation, filing a false registration statement for Liquid Yield Option Notes (LYONs for short), breach of contract, clearing negligence, and so on. (*See* 15 U.S.C. § 78o; 17 C.F.R. § 240.15b1-5; NYSE Constitution Article I, Sec. 2. *incorporated by reference; and Exchange Services Inc. v. SEC*, 797 F.2d 188 (4th Cir. 1986).) The Exchange's authority to discipline '*ITS*' members for violations of the Securities Acts produced an outcome in the quoted Judgment that included confirmation of a $3,900.[5] initial profit margin, levied a $7,500,000 expected direct damage component, topped by a 10% simple interest assessment that has accumulated $5,125,000 on the principal balance totaling $12,625,000 owed as of 30 September 2005, while leaving open an unspecified "Punitive" damage amount for subsequent determination of the appropriate civil punishment to ply during the penalty stage of the proceedings. (*See* 15 U.S.C. §§ 78bb(b), 78s; 17 C.F.R. § 240.19d-1 *et seq.*; 28 U.S.C. § 1961; NYSE Rules 15, 358, 360; NYSE Arb. #1997-006647 J.; *and compare* NYSE Arb. #1997-006647 Tr. p. 67 [Pet. App. 15a]; NYSE Arb. #1997-006647 Tr. p. 198 [Pet. App. 17a]; *and French v. MLPF&S*, 784 F.2d 902 (9th Cir. 1986).) The Judgement, selected parts of the sworn testimony Transcript, and paper trail of the U.S. Courts

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4. The NYSE is statutorily required to carry out the purposes of the federal securities laws by enforcing compliance of its members with the applicable rules and regulations covering: the prevention of fraudulent and manipulative acts and practices; and to foster coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not to permit unfair discrimination between customers, issuers, brokers, or dealers; and must not impose any burden on competition. (15 U.S.C. § 78f) In contrast NYSE Rule 440L is an "Instrument of Indemnification and Guarantee Between the Exchange and MLPF&S Inc." (NYSE Rule 440L)

granting and/or denying the *Motion* practice of the parties are reproduced in the Appendix. (*See* Appendix *incorporated herein*.)

THE NATURE OF CERTIORARI JURISDICTION

IV. Justiciable Controversy in Appellate Venue. To concede and properly lay the substantially legal subject matter of this controversy before the high Court body makes reference to seminal documents, to wit; Article III of the Constitution and the Judiciary Act of 1789, where Congress declared "the judicial Power of the United States shall be vested in one Supreme Court." (*See* U.S. CONST. art. III § 1; *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803); *and McCulloch v. Maryland*, 17 U.S. 316, 4 L.Ed. 579 (1819).) Because the ***in personam*** and ***in rem*** ways on which jurisdiction positively rests need only a plain and simple statement reciting federal question, diversity, and amount in controversy doctrines, this part focuses on informing the Court as to the consequences of rendering opinion and the capacity of the Court to tailor its ruling to the flesh and blood of the actual dispute. (*See* U.S. CONST. art. III § 2; 15 U.S.C. §§ 77v, 77vvv, 78aa; 28 U.S.C. §§ 1254, 1331, 1332) Here Petitioner, who has suffered substantial injury in fact caused by meretricious Defendant, in redressing the case may ignore the Clerk's paper of 9 August and engage with impunity in the exercise of such First Amendment rights that said Clerk's 'order'[sic] prohibits, because the State's action therein failed to enforce federal securities laws, provide procedural safeguards, or "immediate appellate review;" thus the Clerk's injunction does not bind. (*See* U.S. CONST. amend. I; Rules of the S.Ct. Rules 10, 11, 12; *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977); *and see also Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).) The Court's treatment of such right of access to meaningful civil adjudication of ripe disputes illustrates the ancillary principle that decision-making processes made essential by the government, must not be denied because of economics to those who are obliged to rely upon such processes, for the government may not deprive someone of that access[5], and must give litigants a meaningful opportunity to be heard in court. (*See Goldberg v. Kelly*, 397 U.S. 254 (1970); *and United States v. SCRAP*,

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[5] The nation-state must admit that it is impossible to satisfy this requirement without examination of a transcript of the proceedings, especially as to the District Court's erroneous 'ORDER' on damages. (*See* U.S.D.C. 'ORDER' *of* 29 JAN 1999 (Instrument #45)- [Petitioner's Appendix 9a]; *and* NYSE Arb. #1997-006647 Transcript. pp. 67, 198 [Petitioner's Appendix 15a, 17a] *attached hereto*.)

412 U.S. 669 (1973); *and Griffin v. Illinois*, 351 U.S. 12 (1956).) Legislatively, jurisdiction stands perfectly in pleas to the Court of last resort concerning- Certiorari to a United States Court of Appeals Before Judgment; wherefore: "a petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court," will be granted upon a showing of public importance. (28 U.S.C. § 2101(e)) At this point, it should be added, that certiorari review is implicitly provided for in cases coming from certain special economic controversies, and also that Appellee's legal position and frivolous contentions have already been held 'moot' as of 10 December 1998. (*See* U.S.D.C. 'ORDER' *of* 10 December 1998 (Instrument #43) [Pet. App. 7a]; *Fry v. United States*, 1975, 95 S.Ct. 1972, 421 U.S. 542, 44 L.Ed.2d 363; *Colgate v. United States*, Ct.Cl. 1929, 50 S.Ct. 22, 280 U.S. 43, 74 L.Ed. 157; *and United States v. Shearer*, Ct.Cl. 1944, 65 S.Ct. 187, 323 U.S. 676, 89 L.Ed. 549.) Moreover, drawing from admissions of defense of 21 December 1998, Defendant's counsel consented to jurisdiction where:

> "Renobato invoked this Court's subject matter jurisdiction when he filed his original suit papers. Because Renobato's complaint raised issues concerning the 1933 Securities Act and the 1934 Securities Exchange Act, the Court has subject matter jurisdiction over the controversy on the basis that it presents a federal question. The Court also can exercise subject matter jurisdiction on the basis of diversity of citizenship: Renobato is a resident of Texas who sought recovery in excess of $75,000,000 from Merrill Lynch, a Delaware corporation." (*See* Defendant's *Motion for Reinstatement... of* 21 December 1998 *adopted by reference.*)

thereby sanctioning this Court with common jurisdiction proper and direct statutory jurisdiction. (28 U.S.C. §§ 1254(1), 2101(e)) In sum, favoring preservation of the people's rights, and in respect of pendent interlocutory review, the authorization for certiorari here is extremely comprehensive and insured at federal law. Service and any notification required by Rule 29 will be suitably made.

CODES, STATUTES, AND RULES INVOLVED

V. Regulatory Codification. The entire scope and range of legislation applicable to Renobato v. Merrill Lynch *et al.* involves provisions of the Constitution, United States Code, Code of Federal Regulations, Regulation T of the Board of Governors of the Federal Reserve System, and includes Federal Rules of Procedure. (U.S. CONST.; 15 U.S.C. §§ 77, 78; 17 C.F.R. Part 240; 12 C.F.R. § 220 *et seq.*; FED.R. CIV.P.; FED.R.CRIM.P.; FED.R. APP.P.; FED.R.EVID.) Precisely,

commencement of the matter relied primarily on Title 15 United States Code Ch. 2A- (15 U.S.C. § 77 *et seq.*, a.k.a. "the Securities Act of 1933", or the "Securities Act"); Title 15 United States Code Ch. 2B- (15 U.S.C. § 78 *et seq.*, a.k.a. "the Securities Act of 1934", or the "Securities Exchange Act"); Title 17 Code of Federal Regulations- (17 C.F.R. *et seq.*); and Title 12 Code of Federal Regulations- (12 C.F.R. *et seq.*, a.k.a. 'Reg T') for basis of legal grounds. (R.) However, the Bill of Rights as well as Federal Rules, and the Local Rules of the 5th Circuit have become more pertinent, applicable, and increasingly relevant in the important case on free trade, open markets, and capitalism. (28 U.S.C.-APPENDIX; 5th Cir. IOP & Local Rules.) Decisional law also assists in substantiating and corroborating Plaintiff's cause of action. (*See Gund*, ***ante***; *and e.g. Helvering v. Southwest Consol. Corp. La.*, 315 U.S. 194, 62 S.Ct. 546, 86 L.Ed. 789; *Ellis v. Merrill Lynch & Co.*, 664 F.Supp. 979 (E.D Pa. 1987); *and O'Neill v. Merrill Lynch*, U.S.D.C. No. 84-C-3181 (N.D.Ill. 1987); *and see also* 26 U.S.C. §§ 148, 368; U.C.C. §§ 8-301, 8-501; DE. Securities Act Title 6, Ch. 73; TX. DTPA § 17.41-17.63) Certain parts of the codes, statutes, and case law involved are put forward in the brief Appendix.

CONSIDERATION OF THE CASE AND MATERIAL FACTS

VI. Aggregate Set of Operative Facts. Entitled Renobato v. Merrill Lynch *et al.* is a straightforward securities Merger and Acquisition ('M&A') leveraged-buy-out ('LBO') case. (R.) At the District Court level, the information numbered H-98-0360 docketed a total of 17 counts of complaint of which four were common law offenses, five causes of complaint were statutory infringements, seven were regulatory breaches, and one industry code citation- on which Plaintiff successfully proved the merits of every count and further demonstrated irreparable injury via ADR NYSE trial. (*See* NYSE #1997-006647 J.; Plaintiff's *Restatement and Legal Translation of* 2 July 2004; *and Beacon Theatres Inv. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).) At about the same time, take note that the National Association of Securities Dealers ('NASD') in its "NASD Regulation℠" letter dated 4 April 1997 had identified definite "operational problems" of Merrill Lynch prior to the NYSE's conviction of Merrill Lynch, just as the SEC was entering a legal position holding in favor of Claimant by administratively processing SCHEDULE 13D on 28 November 2000. (*See* NYSE Arb. #1997-006647 J.; 'NASD R℠' *letter of* 4 April 1997; SEC SCHEDULE 13D *stamped* 28 November 2000 *incorporated by reference; and* Appellant's APPENDICES/RECORD EXCERPTS *of* 19 October 2004 *at* Tab D.) Nevertheless, the specialist 'Data' relates back to clear

settlement issues in respect of open market participation now encompassing over one billion dollars worth of security bills in "good 'til canceled" ('GTC') program trading notions. (*See* 15 U.S.C. §§ 77, 78; 17 C.F.R. Part 240; *and e.g. Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (2nd Cir. 1959).) More specifically, to a legal certainty prosecution's *Bill of Exchange* filed herewith derives $7,500,000 in gross ***mense profits*** on such Judgment plus $5,125,000 in simple interest amassed through 30 September 2005, as well as warranted distribution of stock certificates covering 31,499,550 shares of Automatic Data Processing Inc. ('ADP' [former ticker symbol AUD]) plus $58,510,414.[13] in cash dividends for FY 2001-2004 all of which is supported in evidence and as a matter of law. (*See Hanson Trust PLC v. SCM Corp.*, 774 F.2d. 47 (2nd Cir. 1985); *Grumman Corp., v. LTV Corp.*, 527 F.Supp. 86 (E.D.N.Y.) *affirmed*, 665 F.2d 10 (2nd Cir. 1981); *SEC v. Carter Hawley Hale Stores Inc.*, 760 F.2d 945 (9th Cir. 1985); *and Clark v. Commissioner of Internal Revenue*, C.A.Fed., 266 F.2d 698.) Neither prosecutorial *Restatement*, nor *Petition for Enforcement of Commission ('SEC') SCHEDULE 13D* litigation have ever been seriously refuted or challenged by Merrill Lynch or any of their accessory attorney's to date. (*See* Appellee's "Answer to..." (if any) Appellant's *Petition for Enforcement of Commission ('SEC') SCHEDULE 13D* [filed pursuant to 15 U.S.C. §§ 78l, 78m(d); 17 C.F.R. § 240.13d-1; *and* FED.R.APP.P. Rule 15] *of* 19 October 2004.) Procedurally then, if the weight of the parallel Federal Rules are equitable, then their application would; (1) strike the majority of Defense's papers on the grounds that their weak pleadings admit certain facts of Judgment and 13D holdings while failing to specifically 'deny' as required under Rule 8(d), and are infrequently signed by Mr. Ballard as Rule 11 requires; (2) find abolished-Defense's bare bones demurrers (according to Rule 7(c)) proffered under the guise of generic "Answer(s) to..." ***sans ce que*** minimum scintilla of evidence (*See Chiniche v. Smith*, Ala. 374 So.2d 872, 873; *Wilson v. Liberty Nat. Life Ins. Co.*, Ala., 331 So.2d 617, 619.); and (3) reject Defense's work products that are not constructed to the detailed specifications of Civil Rule 8(c), do not contain supporting documents under Appellate Rule 27(a)(2)(B), and are unsupported by the record [Appellate Rule 10(b)(2)]. (*See* FED.R.CIV.P. *and* FED.R.APP.P. *generally*.) Manifestly, it is incontrovertible that derelict market maker Merrill Lynch & Co. is only one of the possible entities to be charged with matters surrounding civil liability on account of its false registration statement (15 U.S.C. § 77k(a)(5)) and that such underwriter's LYON™ Prospectus has been found to be

statutorily false, deceptive, and/or misleading in the "DESCRIPTION OF CAPITAL STOCK" section regarding domestic Automatic Data Processing Inc. equity securities listed on the Street and offered for trading within interstate commerce. (R.) However, the matter has been totally mischaracterized, misrepresented, and wrongly colored by 'The Ballard Law Firm'[sic] as being suit wherein the NYSE trial losers including fraudulent MLPF&S and negligent MLPCC (whom Mr. Ballard perjuriously avers "there is no company named 'Merrill Lynch Professional Clearing Corp.'"[6]) are not subjected to sentencing procedures by prevailing real party Plaintiff. On top of Mr. Ballard's false statements, his accomplice aiders and abettors go on to conspire in untruthfully purporting that the partial $3,900 payment was accepted as "payment in full and final satisfaction of all claims between the parties" (when it was not), therein somehow releasing Defendants from further prosecution for the $7,500,000 balance due because treble damage recovery on the face value of SCHEDULE 13D is allegedly unavailable versus the Merrill Lynch RICO organization as is more than the $700,000,000 offering price to the public. (*See* 15 U.S.C. § 77k; U.C.C. § 3-311; 18 U.S.C. §§ 1001, 1961, 1962, 1964(c).) Now the truth is that it seems clear the SRO tried the issues of the case wherein fraudulent Defendant was given full opportunity to be heard- and resolved the meritorious 'bona fide' arbitrage cause of action completely in favor of winning Judgment creditor Plaintiff. (R.) Hereafter, the Supreme Court is asked to give teeth in meaning and effect, to federal law namely; U.S.C., C.F.R., and Federal Rules, in honoring the NYSE Judgment and enforcing SEC contracts as must exist in regular legal practice because if not, the invalid unsigned Clerk's 'order'[sic] will unlawfully interfere with rightful payments in unanimous securities verdicts thereby compounding injuries to Claimant's business property, devaluing his commercial operations, and imminently endangering his personal livelihood.

VII. Reg T Securities Account Compliance. Respondent is not in compliance with Regulation T account recording standards and has attempted to defraud the authorities, the Court, and the Plaintiff at all times relevant hereto, about the type of transaction(s) that have

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6. DE Secretary of State, Edward J. Freel, issued a statement (12 Sep. 98) under seal attesting to the existence of 'Merrill Lynch Professional Clearing Corporation.' (*See* Plaintiff's *Restatement... at* Tab H, *and compare* Defendant's *Motion to Dismiss... at* p.1 fn. 1 *incorporated by reference*.) Notice also that 'Ballard' *et al.* has no first hand knowledge of any of the ultimate facts of the matter and excessively speculates about every real aspect of the events that have transpired thus far. (7 U.S.C. § 6a)

been conducted. (12 C.F.R. § 220.1) The evidentiary facts are, in this regard, on 10 February 1997 by depositing $1,250 in cash Plaintiff accepted the Defendant's offering of opening a preliminary "Cash Management Account" ('CMA') numbered 56-21K83[7] which- to this very day is primarily owned by and registered under Renobato's name and social security number. (*See* CMA ACCOUNT APPLICATION AND AGREEMENT FORM #56-21K83; *and* Record.) Of the nine possible account types available under Reg T, the identified section 220.8 'Cash Account' enables certain permissible transactions wherefore a broker is to "sell for any customer any security or other asset if- the security is held in the account; or the broker accepts in good faith the customer's statement that the security is owned by the customer or the customer's agent, and that it will be promptly deposited in the account" OR "sell an option for any customer as a part of a covered option transaction." (*See* 12 C.F.R. §§ 220.8(a)(2), 220.8(a)(3); Appellant's CMA Account #56-21K83 [history]; *and* 17 C.F.R. Part 240 Subpart A.) Here the record shows that Appellant, using delivery in to separate securities accounts, executed bona fide arbitrage between the stock and bond markets for Automatic Data Processing Inc. securities denominated as common stock and subordinated debentures (*i.e.* LYONs) whereupon Claimant fully paid for the "purchase" of 100 shares of fungible equity securities at 42 on 6 February 1997 through Schroder Wertheim & Co., then at about the same time as practicable on 14 February 1997 instructed Respondent Merrill Lynch Pierce Fenner & Smith Inc. to "sell" for public customer investor Renobato the identical security at 55 that was already owned by Plaintiff and which was promptly delivered into the account (in margin excess*) on final settlement date of 20 February 1997 to close out the reverse stock split position DVP/COD. (15 U.S.C. §§ 77b(3), 78c(a)(14); 17 C.F.R. §§ 240.15c1-1, 240.15c6-1, 240.16a-4; 12 C.F.R. § 220.7; NYSE Rules 3, 4, 5, 8, 13, 225; NASD Rules 0120(a), 1020(f), 11320, 11361, 11362, 3370(b)(1); NYSE Arb. #1997-006647 Tr. p 208 [Pet. App. 18a]) Accounting on the completion of the transaction results in a $3,900 profit margin on the arbitrage trade ($8,120.15 - $4,290 = $3,830 [plus writing off $70 commission equals $3,900]) in addition to 3 excess shares of capital stock (100 – 97 [15 X 6.461 = 96.915] = 3 *statutory 'conversion'[sic] rate is '6.461

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[7] Notice that Merrill Lynch has attempted to evade the statutory record keeping requirements of the 1934 Act by changing the account type to 'Individual Investor Account' undiscernible under Reg T, and also by manipulatively altering the account number to a fictitious 2AT 69D98 for purposes of deception. (NASD IM 2310-2)

stock to 1 note'). (*See* Record; NYSE Arb. #1997-006647 Judgment; *and* Plaintiff's SCHEDULE OF RECAPITALIZATION *incorporated by reference*.) In other words, Appellee's frauds, breaches, deceptions, and torts forseeably caused Petitioner opportunity cost injuries during the programmed LBO period as same was to have enjoyed use of such free credit balance $8,120.[15] sale proceeds, $2,017 in cash (2 deposits [$1,250 and $767], and 3 shares of ADP on demand for the cash deposits, and on 20 February 1997 for the contract of sale proceeds and residual stock for use in 'roll-over' into reinvestments as the concurrent disparity remains to this very day. (*See* 17 C.F.R. §§ 240.14a-15, 240.15c3-3, 240.17Ad-2, 240.17Ad-11; *Field v. Trump*, 850 F.2d 938 (2nd Cir. 1988); *and Rondeau v. Mosinee Paper Corp.*, 422 U.S.49, 95 S.Ct. 2069, 45 L.Ed.2d 12 (1975).) Recent Supreme Court decisions on this question have not only verified that a person has the legal right to withdraw from his securities account(s)- the "right to receive... a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract" but also verified that such a withdrawal can be made "at any time and for any purpose." (*See Rousey et ux. v. Jacoway*, S.Ct. No. 03-1407, Argued December 1, 2004 – Decided April 4, 2005; *and United States v. LaBonte*, 520 U.S. 751, 757.) The instant account rendered as stated is a common form of action at law against Merrill Lynch entities, who by reason of some fiduciary relation (as broker, safe-keeper, clearing agent etc.) are bound to render damages and performance to Plaintiff on the basis of federal code and business law but have illegally refused to do so. (*See Peoples Fin. & Thrift Co. of Visalia v. Bowman*, 58 Cal.App.2d 729, 137 P.2d 729; *and Free v. Bland*, 369 U.S. 663 (1962).) Thus, exclusion of arbitrageur Renobato from the "T+3" trading cycles and customary settlement systems by Merrill Lynch is illegal, as hedge funds and even amateur speculators are allowed to participate in transacting bids and offers on executable Securities Confirmation contracts in order to receive capital interests and payments through Depository Trust Company routes. (*See Transactive Corp. v. United States*, 91 F.3d 232 (D.C. Cir. 1996).) Therefore this Court, acting as a responsible organ of government, is summoned in good faith to represent the best values of detached and neutral Justices in sorting out each and every question presented, and to secure the widely circulated issues of recapitalization and asset ownership on such SCHEDULE 13D investment contract of Appellant. (*See* 17 C.F.R. § 240.16b-7;*Village of Belle Terre v. Boraas*, 416 U.S. 1(1974); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *and McGautha v. California*, 402 U.S. 183, 265 (1971).)

VIII. Merrill Lynch's Aggregate Indebtedness Default. By law, brokers are required to maintain enough net capital on hand to pay their obligations on customer reverse repurchase (repo's) agreement contracts and on other items of debt. (17 C.F.R. § 240.15c3-1(a); NYSE Rule 325) The term 'aggregate indebtedness' means the total money liabilities of a broker arising in connection with any transaction whatsoever. (17 C.F.R. § 240.15c3-1(c)(1)) In this case, the material instrumentalities of indenture heretofore neglected to be performed on by Appellee and that await execution by the Court are found; (1) in underwriter Merrill Lynch & Co.'s LYON™ Prospectus, (2) in the Exchange's Judgment finding Merrill Lynch liable as debtor, and (3) in Appellant's SCHEDULE 13D entitlements. (2 Bl.Comm. 465; U.C.C. § 9-105(1)(d)) Controlling section 240.15c3-1 standardizes the ratio of aggregate indebtedness which MLPF&S is permitted to carry and is brought into question as their reported $3.4 billion in liquid capital is less than the $4 billion 'buy-in' treble damage amount of the current market capitalization of SCHEDULE 13D face value that would put MLPF&S into bankruptcy, whereas under articles 627 and 637 of NYSE Rules insolvent MLPF&S's delinquency on the $7,500,000 amount stands in arrears for $5,125,000 in simple interest through 30 September 2005. (*See* 17 C.F.R. § 240.15c3-1; NYSE Rules 282, 627, 637; Merrill Lynch Pierce Fenner & Smith Inc. 1999 Balance Sheet [www.plan.ml.com/MLPF&S_Financials]; *but cf.* SCHEDULE 13D- 31,499,550 *shares of* ADP *quoted at* $42.45 *as of* 12 October 2005 *multiplied times three*.) Technically, Title 15 U.S.C. Subtitle 2A and Title 17 C.F.R. Regulation 13D make statutory provisions for governance of securities exchanges, trade options, and/or large position deals and stipulate that underwriter Merrill Lynch & Co.'s registration statement for the LYON™ bond issue be free from defects- thus Appellee's statement "Under the laws of the State of Delaware, shares of the Company's Common Stock may be, in effect, redeemed through mergers or similar transactions by which such shares are converted into cash, debt securities[8] or other property," must be specifically performed in the Court's FINAL MANDATE. (*See* 15 U.S.C. § 77aaa *et seq.*; *and* Merrill Lynch & Co.'s LYON™ ADP Prospectus 'DESCRIPTION OF CAPITAL STOCK' *at* p. 23) This is true as 'Civil Liabilities on Account of False Registration Statement' attach in any case where any part of the "registration

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8. *Debt security* means 'any security, such as a bond, debenture, **note**, or any **similar instrument** which evidences a liability of the issuer (including any such security that is convertible into stock or a similar security).' (17 C.F.R. § 240.10b-10(d)(4))

statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading," enabling any person acquiring such security, either at law or in equity, in any court of competent jurisdiction, to sue- "every underwriter with respect to such security." (15 U.S.C. § 77k) Clearly, Appellant's current debt claims now before the Court are within the bottom line amount recoupable for that one offense alone, as enumerated according to Title 15 U.S.C. § 77k, wherefore "in no case shall the amount recoverable under this section exceed the price at which the security was offered to the public" (*i.e.* $700 million). (*See* 15 U.S.C. § 77k(a); *cf.* Merrill Lynch & Co.'s ADP LYON Prospectus *face*.) Certainly then, liability on credit obligations and in market maker duties on certificates of indebtedness as based on the Liquid Yield Option Notes securing collateral debt payments- constitute corporate derivatives under investment banking rules and are enforceable at law. (11 U.S.C. § 101) ***A priori*** this action on account of debt to enforce and collect a sum of money owing to Judgment creditor from Defendant entities; covers 13D valuation rights and public customer's right to receive dividends, in addition to custom performance of Respondent to transact the exchange or disposition of securities made available to all holders of ADP equity securities. (*See State v. Ducey*, 25 Ohio App.2d 50, 266 N.E.2d 233.)

IX. Credible Criminal Theft Case Versus Respondent. It seems to reason that one must inspect the overlying ***prima facie*** case and tangible evidence, investigate the underlying bill of the Exchange, and read the criminal charges filed with the NYSE and the SEC concerning Merrill Lynch's criminal acts of embezzlement committed with scienter, before framing an opinion or rendering decision about the civil side of the federal securities lawsuit brought under the law merchant. (*See* Appellant's APPENDICES/RECORD EXCERPTS *of* 19 October 2004 *at* Tab D; FED.R.CIV.P. Rules 26, 34; *and see also State ex rel. Herbert v. Whims*, 68 Ohio App. 39, 38 N.E.2d 596, 22 O.O. 110; *and State Farm Mutual Auto. Ins. Co. v. Rickhoff*, Mo.App., 509 S.W.2d 485.) Positively, the appropriate form of action adapted for recovery of damages for property injury resulting to the Appellant from the intentional commission of larceny perpetrated by the evil minded Appellee is by an *Information* or *Indictment* in the nature of 'trespass on the case' or 'theft' and comprehends all malfeasance, transgressions, or offenses which have damaged Plaintiff's estate property and/or business holdings through Defendant's criminal 'conversion'[sic]. (*See Mueller v. Brunn*, 105 Wis.2d 171, 313 N.W.2d

790, 794; *and King v. Citizens Bank of DeKalb*, 88 Ga.App. 40, 76 S.E.2d 86.) However, zeroing in on exactly what purposeful acts of Appellees constitute indictable information in this case is not so readily apparent on the pleadings because the matter is complex and complicated involving securities *haircuts*, PARTICIPANT *hypotheticals*, reverse repo's, sales against the warrant box, and intangible property, whereas apprehension of the subject is difficult as the front for artificial person Merrill Lynch corporate headquarters is in Delaware, but the physical back office nexus of operations lies between New Jersey and New York, whereas they maintain retail operations in Houston and have minimum contacts in virtually every State. (18 U.S.C. §§ 641, 648, 656; M.P.C. § 223; 17 C.F.R. § 240.15c3-1; 31 C.F.R. Part 357, App. B(J.)) More, comprehending the electronic case connects the NYSE inter-market trading system applications transferring the specific 'buy/sell' ticket market orders for round blocks through the intermediary 'National System for Clearance and Settlement' network into the designated depository account at such secondary retail brokerage institution[9] leaving additional odd lot shares. (R.) However, only physical ADF corporate currency stocks (and not mere electronic entries) are the form of security certificates to be turned over by BD Merrill Lynch in discharging its 13D duties. (17 C.F.R. § 240.13d-1) ***A posteriori*** the referenced long arm criminal laws transmutes the nation-state's protection of the public interest in securities property and books no restraint by the Court on its exercise in penalizing recidivist Respondent actor. (*See* 18 U.S.C. § 3551; *and Mempha v. Ray*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336.)

X. Materiality In Connection With the Federal Regulatory Zone of Interests. The federal legal system is "an independent system for administering justice to litigants who properly invoke its jurisdiction." (*See Byrd v. Blue Ridge Rural Electric Cooperative Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958).) On the other hand, the securities laws provide a wide variety of express statutory remedies for injured investors in horizontal commonality, in addition to powerful private enforcement weapons that have arisen out of implied rights of action. (15 U.S.C. §§ 77k, 77l(1), 77www, 78i(e), 78p(b), 78r(a), 80a-36(b)) Furthermore, as Plaintiff's complaint is within the prudential zone of interests protected by the federal commerce and trade law cited, the instant case builds on separation of powers and recognizes "the proper- and properly limited –role of the courts in a democratic society." (*See Allen v. Wright*, 468 U.S. 737, 751(1984); *and Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).) These notions are important in screening that Petitioner's

case qualifies for review by the Supreme Court as one where the Plaintiff is in a legislatively protected class, and "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (*See Association of Data Processing Service Organizations Inc. v. Camp*, 397 U.S. 150, 154 (1970); *and Clarke v. Securities Industry Ass'n*, 107 S.Ct. 750, 757 (1987).) Consequently, there is no need for the Court to look beyond the concrete SEC 13D contract and NYSE Judgment evidence in discerning the protected zone of interests. (*See* 15 U.S.C. § 78m(d); 17 C.F.R. § 240.13d-1; FED. R.CIV.P. Rules 58, 69) Overall, the overriding fact is that Appellant established propriety by defeating Defendant commonly and on 15 U.S.C. §§ 77, 78; 17 C.F.R. Part 240, and Reg T, whereas this Court must now apply fair play and substantial justice in its conclusion on the 'purchases,' 'sales,' and SEC instructions. (FED.R.APP.P. Rule 15)

XI. Family Resemblance Issues. The broad coverage of the statutory definition of security has brought into reach of the federal securities laws such things as: scotch whiskey, cosmetics, beavers, vacuum cleaners, cattle embryos, pooled litigation funds, and even fruit trees. (*See SEC v. Glen-Arden Commodities Inc.*, [1973 Transfer Binder] Fed.Sec. L.Rep. (CCH) ¶94,142 (E.D.N.Y.); *SEC v. M.A. Lundy Associates*, 362 F.Supp. 226 (D.R.I. 1973); *SEC v. Koscott Interplanetary Inc.*, 497 F.2d 473 (5th Cir. 1974); *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967); *Eberhardt v. Waters*, 901 F.2d 1578 (11th Cir. 1990); *B.J. Tannenbaum Jr.*, 18 Sec.L. Reg. & L.Rep. (BNA) 1826 (SEC No Action Letter Dec. 4, 1986); *and SEC v. W.J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946).) Clearly, the test the Court employs to determine whether an issue is a security is the so-called "Family Resemblance" test where overlying Notes that match underlying common shares and/or stock options are indeed a security.[10] (*See Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945, 108 L.Ed.2d. 47 (1990), *rehearing denied*, 494 U.S. 1092, 110 S.Ct. 1840, 108 L.Ed.2d 968 (1990).) Therefore, the LYONs that are a registered "service-mark" invented by the tortfeasor Merrill Lynch & Co. underwriter who manufactured, floated wholesale, and solicits retail- the said defective financial

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9. GENERAL ACCOUNTING OFFICE; *Payments, Clearance, and Settlement: A Guide to the System, Risks, and Issues*, GAO-GGD-97-73.

10. 'Stock' is expressly included in the statutory definition of security. (*See Landreth Timber Co. v. Landreth*, 731 F.2d 1348 (9th Cir. 1984), *reversed*, 471 U.S. 681, 105 S.Ct. 2297, 85 L.Ed2d 692 (1985); *and Daily v. Morgan*, 701 F.2d 496 (5th Cir. 1983).)

product unreasonably dangerous, is completely responsible for stipulating the binding terms for the equity security in the LYON Prospectus, having thereby expressly misrepresented the "liquid yield" benefits and warranted fungibility of the equity securities of subject company Automatic Data Processing Inc. and is strictly liable in damages for any and all deviation therefrom. (*See* U.C.C. §§ 2-313, 2-314, 2-315; Restatement §§ 402A, 402B; *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944); *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2nd Cir. 1947); *and Greenman v. Yuba Power Products Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963).) Discover, however, that although the development of electronic banking and commerce technologies have strained usual regulatory concepts and raised questions as to when and how the government should regulate various products, trades, and services that have emerged in today's markets, according the Supreme Court such derivative equity securities are to be treated as "virtually identical" under the federal securities laws. (*See Tcherepnin v. Knight*, 389 U.S. 322, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967); *King v. Idaho Funeral Services Ass'n*, 862 F.2d 744 (9th Cir. 1988); *and ESI Montgomery County Inc. v. Montenay Int'l Corp.*, 899 F.Supp. 1061, 1065 (E.D.N.Y. 1995).) The point is that the Court of Appeals in narrowing the issues has identified the true ownership of securities entitlements in that Claimant Renobato's "funds due plus simple interest thereon totaling $12,437,500 and... delivery of securities certificates representing 31,499,550 shares of Automatic Data Processing Inc. including accrued dividend distributions thereon since 28 November 2000" remain outstanding as per the three-judge panel for the NYSE and the SEC investment contract SCHEDULE 13D title deed in Plaintiff's name. (*See* 9 AUG 2005 Court 'order'[sic]; *and compare* NYSE #1997-006647 Judgment; *and* SEC SCHEDULE 13D; *and Marine Bank v. Weaver*, 455 U.S. 551, 102 S.Ct. 1220, 71 L.Ed.2d 409 (1892), *but cf. Pollack v. Laidlaw Holdings Inc.*, 27 F.3d 808 (2nd Cir. 1994).) Both documents require and demand protection, for otherwise the Clerk's paper throws the law governing arbitrage, commerce and trade, and settlements into complete disarray because of the failure of the Judicial Branch to give full faith and credit to the regulatory authorities holdings. (U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738) This conflict in rulings among the securities trade regulators and judicial orders means that; until this Court clearly resolves the issues, courts reviewing simple purchases and sales of securities will not be sure what criteria to apply in deciding federal questions due to vagueness. (*See McCrary v. State*, Ala.Cr.App., 429 So.2d

1121; *Porta v. Mayor City of Omaha*, D.C.Neb., 593 F.Supp. 963.)
XII. Legal Use of Program Trading as Schedule Leverage. Arbitrage and LBO transactions are perfectly legal conduct in the corporate equity and high yield bond markets respectively. (Reg T § 220.7) Basically, 'leverage' can be defined as the use of a smaller investment to generate a larger rate of return through debt usage, whereas 'program trading' operates on tracking price discrepancies between options and the cash value of the underlying asset and locks in profit margins by arbitraging on volume trading as depicted in Claimants SCHEDULE OF RECAPITALIZATION. (*See* Plaintiff's *Restatement... of* 2 July 2004 *at* Tab U2; *and e.g. Community Bank v. Jones*, 278 Or. 647, 566 P.2d 470.) This efficient use of program trading leverage is critical to; (1) the maintenance of fair and orderly markets, (2) the scheduled rate of return, and (3) an arbitrageur's ***animus lucrandi*** and is dependent on best execution by the broker. Records further illustrate that Petitioner is well versed in gearing net long positions against a matching sale position in order to unwind the beneficial effects of arbitrage transactions in both corporate takeovers and government security *STRIPS TRADES*. (*See* 15 U.S.C. §§ 78c(13), 78c(14); 17 C.F.R. § 240.13d-1; Fed.Sec.L.Rep. (CCH) Bulletin No. 1418 (Oct. 23, 1990); *Renobato v. Merrill Lynch et. al.*, NYSE Arbitration #1997-006647 Judgment; *and see also Renobato v. Bureau of the Public Debt*, U.S. S.Ct. *case* 01-830 *now pending*.) Also, program trading and the Schedule used in leveraging exchanges and in procuring transfers in corporate security 'purchase' and 'sale' contracts relying on quoted market prices and form SCHEDULE 13D is lawful practice. (*See* Nicholas Katzenbach, *An Overview of Program Trading and its Impact on Current Market Practices* (1987).) Incidentally, the reverse repo deficit represented by the price differential between the current market capitalization of securities subject to the 13D investment contract on the obligatory repurchase of such securities at appropriate market values by the Merrill Lynch market maker has lead to charging Defendants with unlawfully conspiring to eliminate Plaintiff's use of 'securities haircuts' in the stock market. (*See* Federal Reserve System Reg T (Rulings and Opinions) Transmittal 184 (6/96) Page 5-424; 17 C.F.R. §§ 240.15c3-1; 402; *and compare* 31 C.F.R. § 356.2.) In accord therewith, the Court must discipline Respondent's elemental securities law violations involving obstruction of a programmed reverse merger, and that restrain lawful arbitrage trades in interstate commerce so that change in Plaintiff's adjusted net cap resulting from the acquisition of additional shares at a comparatively low price (through the exercise

of rights/warrants) or the convertibility of derivatives, will be made in rights[11] and such must be enforced and upheld. (15 U.S.C. §§ 1, 2)

JUSTIFIED REASONS FOR ALLOWANCE OF THE WRIT

XIII. (A.) SPLIT DECISIONS- **Judicial Oversight.** There are an array of affirmative reasons why the Supreme Court should positively grant the instant *Petition* which are labeled as; (1) conflicting circuits, (2) mistaken inferences drawn against articles of the Constitution, the Act of 1933, the Act of 1934, and Regulation T, and (3) failure in enforcement of administrative SEC holdings. (U.S. CONST.; 15 U.S.C. §§ 77, 78; 17 C.F.R. Part 240; 12 C.F.R. § 220.7)

1. Conflict Between Circuits. Generally, this treatise presents major issues of business, exchange, and arbitrage and states that the Clerk of the 5th Circuit has filed an 'order'[sic] in conflict with the precedent holding of actual Justices in the 11th Circuit Court of Appeals on the similar matter of a statutory corporate director selling bonds and buying stocks or ***vice versa*** in short swing trades. (*See* para. I, II ***supra***; *and Gund* [Pet. App. 65a]) In doing so the Clerk has opined on important federal securities law questions in a way that has so far departed from the accepted and usual course of legal proceedings as to call for an exercise of this Court's supervisory powers. (*See Blau, Heili-Coil, **post.***) ***A fortiori,*** this timely *Petition* stands to overcome the Clerk's proffering of an indefinite and vague 'order'[sic] that mishandled the matter in such a way that also creates division within the 5th Circuit itself as to recapitalization in the securities industry, and that is contrary to the language of the free trade and open market system and thus requires strict scrutiny review. (*See* 12 U.S.C. § 263(c); 17 C.F.R. §§ 240.16a-1, 240.16b-1, 240.16b-7, 240.16e-1; FED.R.APP.P. Rule 35; *and Texas Int'l Airlines v. National Airlines Inc.*, 714 F.2d 533 (5th Cir. 1983).) Thus, the unsigned Clerk's paper of the appeliate institution stands at odds with practically every securities law case dealing with issues of price manipulation, securities fraud, profit calculus, LBO takeovers, short swing trading, clearing negligence, and damage recovery. (*See Blau v. Lamb*, 363 F.2d 507 (1966); *Chemical Fund Inc. v. Xerox Corporation*, 377 F.2d 107 (1967); *Heli-Coil Corp. v. Webster*, 222 F.Supp. 831 (1963); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 36 L.Ed.2d 503, 93 S.Ct. 1736; *Newmark v. RKO General Inc.*, 425 F.2d 348 (1970); *Ohio Drill & Tool Co. v. Johnson*, 498 F.2d 186 (1974); *and In re Ivan F. Boesky Securities Litigation*, 36 F.3d 255 (2nd Cir. 1994).) In particular, the differing legal standards

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[11] COTTLE, MURRAY & BLOCK; Graham & Dodd's Security Analysis, 5th Ed. (1988).

split between U.S. Courts decisions, if unabated, (1) will cause widespread confusion surrounding the rules- making enforcement of Judgments mere chancy propositions, (2) strongly discourages business investment within American capital markets at large, and (3) violates the rules of evidence. (R.) Last, this case is of such public importance to society at large because of the beneficial economic expansion derived, the capital stimulus supplied, and trade growth bearing directly on the area's status and should be critically examined.

2. Code Integrity and Regulatory Compliance. The principal integrity of United States Code and Code of Federal Regulation has been jeopardized by the lower Courts code approach; (1) ordering that the case was eligible for reinstatement and then failing to abide by the same, (2) by allowing an overreaching Clerk to direct an 'order'[sic], (3) by not addressing the principal statutory issues put before the Court for clear determination, and (4) by neglecting to give full effect to the NYSE Judgment instrument and to the SEC SCHEDULE 13D investment contract. (R.) On their face, the inconsistent renditions endanger nationwide issues concerning liberty of contract, Judgment enforcement, and primary personal property rights under statutory federal law. (15 U.S.C. §§ 77, 78) The fact of the matter is that the un-titled 9 August document of the Clerk, purportedly an "order," but disseminated under pretext of En Banc (*i.e.* 'Per Curiam'[sic]) source was filed where no such discretionary authority permits a Clerk to decide procedural much less substantive issues under federal rules. (*See* 5th Circuit's 9 August 2005 "order'[sic] *text; and compare* Rules and IOP of the 5th Circuit Rule 27) More recently, on Appellant's unopposed *Notice of Discretionary Limitation, Motion to Reverse Order of Clerk Officer, and Motion for Justice, Board, or Agency Review* originally served 20 August, and timely *Notice of Independent Action, Motion for Relief From Clerk's Order, and Motion for Leave to Correct Clerk's Plain Error* later served on 21 August 2005, the Appeals Court failed to execute same, has not formed any response, and from the onset has neglected to honor a SCHEDULE 13D Registration Statement *STAMPED* by the Commission. (*See* Appellant's 22 & 23 August 2005 *Court filings*; & *Appellant's Brief* attachments.) Thereby, Plaintiff's rights, powers, and privileges have been unfairly mutilated, defaced, and destroyed; whereas corresponding customs, duties, and obligations of the fugitive malefactor Defendant convict have been unreasonably deferred and impaired by the messages supplied in such judicial actions. (R.) Stated bluntly, the legislative intent of the Congress that enacted the Securities Act and Securities Exchange

Act did so as a way of protecting consumers against manipulative and deceptive practices of fraudulent broker-dealers. (*See Avery v. Merrill Lynch*, 328 F.Supp. 677 (1971) [long sales and money on deposit]; *Dzenits v. Merrill Lynch*, 494 F.2d 168 (1974) [churning]; *Jacobson v. Merrill Lynch*, 797 F.2d 1197 (3rd Cir. 1986) [federal securities law violations, common law violations, RICO violations]; *McKeel v. Merrill Lynch*, 419 F.2d 1291 (1969) [title to property].) But for now, since the Interstate Commerce clause in Article I Section 8 of the Constitution, and the Commerce and Trade articles enacted pursuant to United States Code have been ignored by the acts promulgated in such Clerk's paperwork, the apparent operation of the law in the Judicial Branch has inappropriately precluded Claimant from obtaining overdue relief in the form of legal obligations on corporate derivative equity securities contracts, and must be adjusted, modified, and amended to reflect propriety. (*See* U.S. CONST. art. 1 § 8; 15 U.S.C. § 78m; 49 U.S.C. § 10101; 17 C.F.R. § 240.13d-1 *et seq.*; NYSE Rules; *and* NASD Rules) These unorthodox developments reveal disagreement among the Courts and the law involving the substance of commerce and trade, which only the Supreme Court can finally resolve. Therefore, ***Certiorari*** should be granted to establish uniformity of policy for contesting corporate misdeeds, for if the acts go unchecked they will discredit the cited authorities and other litigants will confront the impossible burden of settling business matters in federal court without aid of the law.

XIV. (B.) CONSTITUTIONAL PORTFOLIO- **Life, liberty, property; expression freedom; due process; and lawful business contract examinations.** The sweep of legal issues heretofore put forward and explored in Renobato v. Merrill Lynch *et al.* are numerous and many fold. (*See* Plaintiff's *Restatement and Legal Translation...; and Appellants Brief of* 16 August 2000.) Notwithstanding, a Clerk's unsigned and vague paper and joint lower level Federal Judge's acts- at odds with the Judgment of the NYSE facility and holding of the administrative SEC agency each constitutes official mistakes upon which the following Constitutional exceptions 'arise under'- as are connected to the model that property ownership can be protected through due legal processes. (*See* [Pet. App. 21a, 25a, 49a, 57a, 59a].)

1. Seizing Legal Procedures that are Due in Sentencing Convicted Respondent. Although the Due Process Clause maintains a total "independent potency" of its own in context of purely federal matters, recall that the Bill of Right's Fourteenth Amendment substantially incorporates various fundamental Constitutional guarantees as applicable throughout the nation-state(s). (*See*

Adamson v. California, 332 U.S. 4', 67 S.Ct. 1672, 91 L.Ed. 1903 (1947); *and Duncan v. Louisiana*, 91 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).) Generally, the enumerated commands of Due Process both express and implied- stipulate that state action or procedures of government must not "offend those cannons of decency and fairness" but "identify accepted notions of justice" thereby maintaining judicial objectivity. (*See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).) Now since the culpable Appellee has had its opportunity to be heard and was condemned for its fraudulent, deceptive, racketeering influenced, and depraved illegal acts committed against securities Code, prosecution moves to demand enjoyment of the benefits flowing from its NYSE victory. (*See* U.S. CONST. amend VI, U.S. CONST. amend. IX, U.S. CONST. amend. XIV; *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1983, 26 L.Ed.2d 446 (1970); *and Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972)) Consequently, the remaining procedure due in the bifurcated legal process separating trial/liability determination and sentencing/punishment phases in this case is the sentencing of Respondent for its reprehensible conduct in precise ascertainment of gross damages including punitive measures. (*See* 18 U.S.C. Ch. 227 *et seq.*; FED.R.CRIM.P. Rule 32(c); *TXO Production v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *and see also Honda Motor Co. Ltd. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994).) These postulates stem from the obligation of good faith on part of the Judiciary and stand to be affirmed in whole because any deprivation of property caused by symbiotic governmental action that restricts use or enjoyment of Plaintiff's property automatically invokes consideration of the Due Process Clause under a "takings" analysis and therefore just Compensation is also due. (*See* U.S. CONST. amend. V; *and e.g. First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2387, 96 L.Ed.2d 250 (1987)[12]) Here, the Clerk's work product is categorically a compensable taking that encroaches on Petitioner's life and personal rights in that it; (1) has a substantial impact on the protesting party Plaintiff [deprives all use and enjoyment of personal property- $12,625,000 cash and 31,499,550 shares of stock], (2) extensively intermeddles with, or invades on

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12. Holding, that even a "temporary" loss of use of private property will constitute a taking requiring compensation for the period during which use of the property was denied. (*See also Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).)

distinct investment expectations of public investor [forecloses the "sell" or "sale" option], and (3) denotes suspect classification in the government action (*i.e.* mere Clerk's opinion [presenting authority question] as opposed to a Mandate that is signed by federal Circuit Judges) while wrongly leaving Renobato's property in the unclean hands of convicted felon Merrill Lynch. (*See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).) Analogous, the implicit concept of ordered liberty dictates that security interests are of such importance to the individual and society at large that they demand Constitutional protection. (*See* M. Perry, *The Constitution, the Courts and Human Rights* (1982).) Thus, the Supreme Court must actively wage strict judicial scrutiny of due legal procedures deserving of judicial solicitude, and will properly sentence its judicial assignment pursuant to Article III.

2. Fundamental Property Rights and Preferred Liberty of Contract. The general tenet that government authority has limits which safeguards its subjects autonomy predates the establishment of the American republic.[13] Without question Article I, § 10 commands that, "No State shall...pass any...Law impairing the Obligation of Contracts...". (*See Lynch v. United States*, 292 U.S. 571 (1934) *Lichter v. United States*, 334 U.S. 742 (1948); *Perry v. United States*, 294 U.S. 330, 353-54 (1935).) Similarly, rights of property ownership as in investment contracts has emerged as an implied interpretation of, and are insured under the Bill of Rights, virtually guaranteeing that "[t]he right to purchase or sell... is part of the liberty protected." (*See Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905); *and compare Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, &8 L.Ed. 940 (1934).) The undisputable fact of the matter is that Appellant and Appellee voluntarily formed a contractual business relationship (*i.e.* freedom of association) in February 1997 whereby brokerage MLPF&S agreed to broker "purchases" and "sales" (*i.e.* liberty of contract) and to accept "delivery" of property from public investor Renobato, whereas transfer agent MLPCC simultaneously took on the corresponding duty to clear and settle each and every one of those transactions. (*See* Record; *and Lynch v. Household Finance Corporation*, 405 U.S. 538, 92 S.Ct. 1113, 31L.Ed.2d 424 (1972).) Thus, ordering of economic relationships is supported under the penumbra of protections afforded in the federal system on a reasonableness of law inquiry

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13. *See* B. BAILYN, The Ideological Origins of the American Revolution 55-93, 175-98 (1967); G. WOOD, Creation of the American Republic (1969).

pursued in the spirit of science, on proof of facts exactly and fairly stated, and on evidentiary records procuring a final judgement not ***ad hoc*** and arbitrary, but a "judicial determination to the effect that renders a court ***functus officio***" so the shifted burden remains on Merrill Lynch to prove that the 1933 Act and 1934 Exchange Act are not rationally related to a legitimate governmental interest in regulating interstate securities commerce. (*See United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 2010, 52 L.Ed. 1234 (1938).) Such premises are applicable to the acts of Fulbruge who has burdened Appellant's warranted exercise of fundamental rights of property improvement and alienation, and that are shielded from improvident impairment by law. Abridgement of Claimant's business welfare or prosperity in property contracts by such acts of the Clerk evinces a wholesale abandonment from the authorities of record. (*See East New York Sav. Bank v. Hahn*, 326 U.S. 230, (1945); *and Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940).)

3. Indentured Servitude. The Trust Indenture Act of 1940 sets forth the law presiding over how underwriters and issuers are to service their obligations in the bond market and is specifically designed to protect investors in certain issues by requiring that the trust indenture be submitted to the Commission and include concrete protective clauses that the use be independent of the issuing company. (15 U.S.C. § 77aaa) Otherwise, involuntary servitude can be said to be the condition of one who is compelled by force, or coercion, and against his will, to labor for another, whether he is paid or not, ***ipso facto***. (*Ex parte Wilson*, 114 U.S. 417, 5 S.Ct. 935, 29 L.Ed. 89; *In re Slaughterhouse Cases*, 83 U.S. (16 Wall.) 69, 21 L.Ed. 394; *and Robertson v. Baldwin*, 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715.) In related context, debt service can be defined as the interest and charges currently payable on a debt, including principle payments, or a sum of money due by certain and express agreement including not only obligation of debtor to pay, but right of creditor to receive and enforce payment. (*See* Black's Law Dictionary, 405 (6th ed. 1991).) In these respects, Plaintiff has served 8.5 years of his life fighting an insolvent corporation's frauds, underwriter's misrepresentations, market maker's manipulations, bankrupt broker's contract breaches, and clearing agent's negligence. (R.) Definitively, "the very idea that one may be compelled to hold his means of living, or of any other material right essential to the enjoyment of life, at the mere will of another" has been ruled "intolerable in any country where freedom prevails, as being the essence of slavery itself." (*See Yick Wo v. Hopkins*, 118 U.S. 356, 370

(1886).) However, because remote levels of relations with distant federal institutions seem to be the antithesis of respect for personal integrity and autonomy, prosecution will emphasize its rightful place to stand in the persistent war against capricious subjugation at the whim of hegemonic monopolistic Respondent corporation. (*See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).) Thus, it is unconstitutional for Merrill Lynch to impose its lobby powers within the political system and continue to subject Renobato to the badges of indentured servitude on Defendant's own indebtedness issues where Plaintiff has dominated the blameworthy Defendant in every aspect of the contest. (R.) ***Ipso jure***, the argument is that Respondent's illegal acts must be struck down to secure and enforce the prohibition on involuntary service, or compulsion labor for a debt under the Thirteenth Amendment. (U.S. CONST. amend. XIII).

4. Reasonable Force Obtained Through Freedom of Speech. The amount of force legalized for use in protection of mere property is decidedly less than deadly force. (*See* Restatement § 77; *and see e.g.. M'Ilvoy v. Cockran*, 2 A.K. Marsh 271 (Ky. 1820); *and Brown v. Martinez*, 361 P.2d 152 (N.M. 1961).) But for the purpose of collecting a debt- it is something more than physical battery as per the weight of case law authority, however, notice that Petitioner has remained remarkably civil here and has placed utter reliance on Freedom of Expression doctrine to exact recapture of chattel and the appropriate collection of indebtedness from culpable Appellees. (*See* Table of Authorities *for* Case Precedent- *Hemmings, Barton, Smedly, Barnes, Wolf, Young, Higgins, Temple, Smith, Boles, Brown, Vice, Crawford, Hollyway, Wasson, Triplett, Driscoll, McDaniel, Brown, Carmans, Hughes, and Dengel, incorporated by reference.*) Obviously, the cited judicial holdings are practically uniform inasmuch as said principle applies to the forcible collection of a debt, wherefore; "a creditor who assaults his debtor and compels him to pay his debt cannot be convicted."[sic] (*See* Russell on Law of Crimes (7th Eng. Ed.) vol. 2, p. 1120; *and* Bishop's New Criminal Law, vol. 2, § 1162a) In fact, those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. (*See Whitney v. California*, 247 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927).) Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law- the argument of force in its worst form. (*Id.*) Thus, in recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech would be guaranteed and as applied here to prevent

imminent violence in a situation where a convict such as Defendant who faces a Judgement entered against them is not harmed by a sole businessman who seeks to obtain enforcement (*i.e.* payment) of money long overdue. (*See e.g. Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).) Thus, the Court of Appeals can not overbroadly limit prosecution from pleading its case in chief, as was done by Clerk Fulbruge on 9 August 2005 in his proposed quasi-commercial 'order'[sic] that is directly aimed at content control of Plaintiff's issues (*i.e. haircuts*, PARTICIPANT *hypotheticals*, reverse repo's, sales versus the box) to recover pecuniary sums adjudged to be owed and that indirectly attempts to restrict the time, manner, and place of written words within the open Court marketplace forum. (*See* 17 C.F.R. § 240.15c3-1; 31 C.F.R. Part 357, App. B(J.); *Abrams v. United States*, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919); *and Police Dept. City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).) To do otherwise leaves creditor Appellant with no other alternative but to take action using actual force to secure property titled in Plaintiff's name. This is true, as the text of the First Amendment declares that "Congress shall make no law... abridging the freedom of speech,... or the right of the people peaceably to assemble and petition the Government for a redress of grievances." (*See* U.S. CONST. amend. I; *and* Black & Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. Rev. 549 (1962).) As such, the emphasis on individual liberty to develop one's faculties, to participate in lawful occupation, in promotion of individual autonomy, and to further self-determination is rightly called "the most coherent theory of the first amendment." (*See* Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964 (1978).) Unequivocally then, U.S. citizen Renobato's (who has already proven his case in NYSE trial[14]) political criticism of Clerk Fulbruge's failure to schedule sentencing of convicted felon Merrill Lynch requires support in the public Supreme Court forum. Moreover, because the ***de facto*** content of Petitioner's legal papers is of a statutory nature arising under public law it requires absolute protection at the highest level of government AND correlated strict

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14. Without question, successful Claimant had **all** of his legal claims accepted in the competition of the market which has traditionally been the best test for truth. (*See* J. Mill, On Liberty (1859).) As a result, and because he prevailed on each and every count of complaint, the unanimous decision in "the instrument which is their (*i.e.* the arbitration panel's) award" granted a $7,500,000 balance element (plus 10% interest) as part of the damage calculus. (*See* NYSE Arb. #1997-006647 Judgment)

scrutiny review of Fulbruge's content based legislation that must satisfy the narrowly tailored standard meeting some compelling governmental interest. (*See* 15 U.S.C. §§ 77, 78; *and see also Schenck v. United States*, 249 U.S. 47 (1919).) Notice also, that the future work product rhetoric proffered by accessory Defense attorney's poses a clear and present danger to government functions and will continue to subjectively unlawfully advocate and advise lawless action by fraudfeasor Appellee to "violate the law as it stands" and must be proscribed. (*See Masses Pub'g Co v. Patten*, 244 F. 535 (S.D.N.Y.), rev'd, 246 F. 24 (2nd Cir.1917); *and Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).) Thus, Respondent's 'Answer(s)' deserve complete judicial abdication and should not get one bit of support by the Court. (*See North Dakota State Board of Pharmacy v. Snyder's Drug Store*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 397 (1973).) Plaintiff demands resolution as to the First Amendment's platform as a tool for overturning: (1) injurious decisions of the Appeals Clerk that arbitrarily deny enjoyment of money and personal property for an unreasonably indefinite and vague amount of time; (2) overbreadth of interpreted premises in the local rules of the 5th Circuit that have allowed such Clerk to restrict the free trade of ideas in the marketplace depriving Plaintiff of his Constitutional Right to express legal speech in written actions to secure Judgment proceeds and property possessed (*i.e.* title) by Renobato but in custody of criminal Appellee. (*See* U.S. CONST. amend I.; *City of Mobile v. Bolden*, 446 U.S. 55 (1980), *City of Memphis v. Greene*, 451 U.S. 100 (1981); *and United States v. Kras*, 409 U.S. 434, 445 (1973).)

XV. (C.) INTERSTATE COMMERCE AND TRADE, AND BONA FIDE ARBITRAGE GROUP- **Technical Securities, Rule of Law, and Aggregate Indebtedness Debt Claims.** More interest should be paid to the following set of legal prescriptions, supervisory guidelines, and regulatory holdings embedded herein in terms of applying the referenced statutory legislation and rules to the wanton acts of MER.

1. Permissible Reverse Repurchase Agreements in the Free Trade and Open Market System. The issue of whether reverse repurchase agreements and/or investment contracts are legal in the capitalistic American economic system is beyond dispute. (*See In re Bevill, Bresler & Schuman Asset Management Corp.*, 67 B.R. 557, (D.N.J.1986), *and Gibson Greetings Inc. v. Bankers Trust Co.*, Sec.Act.Rel. No. 7124 (S.D.Ohio 1994).) In fact, repurchase agreements play such a central role in the efficient operation of the U.S. capital markets that Congress has ascertained (in the national public interest) that the interests of investors in notes, bonds,

evidences of indebtedness, and certificates of interest are adversely affected when the obligor fails to protect and enforce the rights of investors, especially when the indenture contains provisions which are misleading or deceptive.[15] Of course, the securities markets are an important national asset which must be preserved and strengthened through assurance of efficient execution of securities transactions.[16] (*See e.g.* Omnibus Bankruptcy Improvements Act of 1983, S. Rep. No. 65, 98th Cong., 1st Sess. (1983) *at* p. 45; *People v. Norwood*, 26 Cal.App.3d 148, 103 Cal.Rptr. 7, 11; *Allmon v. Allmon*, Mo.App., 306 S.W.2d 651, 655; *U.S. v. Briggs*, C.A.Fla., 514 F.2d 794, 804; *State v. Hudson*, Tenn.Cr.Ap., 487 S.W.2d 672, 674.) So neither a lower Court Judge nor Clerk may legitimately render alternative or inconsistent viewpoints favoring liable Defendant corporation without examining the NYSE Transcript or SEC 13D evidentiary facts. To the extent that such Court's actions are based on non-credible data supplied by accessory after the fact Ballard, same are voidable, because Merrill Lynch's failure to cover its capital deficiencies resulting from the liquidation of privy exchange transactions is a breach of the repurchase agreement and investment contract(s). (R.) Wherefore the un-heard, but related "Writ of Execution" served upon the guilty Appellee on behalf of entitlement holder Appellant can not be annulled, suspended, or denied by the government's justice as the Judgment lien for securities law violations. (*See* U.C.C. § 3-104; § 3-504(1); NYSE Rule 15-*definition of 'ITS'; and* Appellant's *"Writ of Execution" dated* 12 July 2005.)

2. Empowered SCHEDULE 13D Securities Entitlements. The grossly competitive atmosphere and vociferousness in which takeover battles are fought have become extreme both in terms of public and private ramifications and led to prior Congressional enactment of the Williams Act amendments to the Securities Exchange Act. (*See* Pub. L. No. 90-439, 82 Stat. 454 (1968) codified at 15 U.S.C. §§ 78m(d)-(e), n(d)-(f); *and Huddleston v. MacLean*, 459

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15. Thereby making it necessary for regulation and control of such transactions to remove impediments to and to perfect the mechanisms of clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto, in order to protect interstate commerce, and to insure the maintenance of fair and honest markets. (15 U.S.C. §§ 77bbb, 78b)

16. The rules are designed; (1) to prevent fraudulent and manipulative acts and practices, (2) to promote just and equitable principles of trade, (3) to remove impediments to and perfect the mechanism of a free and open market, and in general (4) to protect investors and the public interest. (15 U.S.C. §§ 78k-1, 78o-3)

U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983).) Although there is no express limitation on the amount of securities that may be acquired through a leveraged buy out, the incontestible fact is that on 28 November 2000, the U.S. Securities and Exchange Commission Mergers and Acquisitions Division put its medallion *STAMP*, processing mark, and government bar code on Plaintiff's SCHEDULE 13D contract thereby definitively recording title to, and evidencing completion the transaction for Renobato's full ownership at the 5% threshold level of exactly 31,499,550 shares of subject company Automatic Data Processing Inc. common stock. (*See* 17 C.F.R. § 240.13d-1; *GAF Corp. v. Milstein*, 453 F.2d 709 (2nd. Cir. 1971); *Staley Continental Inc. v. Drexel Burnham Lambert Inc.*, 1988 WL 36117, [1987-88 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶93,698 (D.C. Cir. 1988); *Corenco Corp. v. Schiavone & Sons Inc.*, 488 F.2d 207 (2nd Cir. 1973); *and Welman v. Dickinson*, 475 F.Supp. 783 (S.D.N.Y.1979).) As it stands by virtue of regulation 13D, Petitioner has not only the legal right to enforce such contract against Respondent- who maintains the correlated duty to turn over such physical securities certificates representing 31,499,550 shares of ADP to proprietor Plaintiff forthwith, but also the right to divest his 13D holdings using MLPF&S as broker for the large position trade. (*See generally* AmL.Inst., Rest.Prop. § 1 (1936), *and see also Borland Finance Co.*, 19 Sec.Reg. & L.Rep. (BNA) 1769 (SEC No Action Letter Oct. 10, 1987).) The capital concern here is this Court's decision on the constitutionality of the takeover act as legislated by Congress because the importance of arriving at a consistent solution to the nation-wide problems regarding corporate takeovers is in peril. (*See* 17 C.F.R. §§ 240.13d-1, 240.16e-1; *and CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987).)

XVI. (D.) ILLEGAL PROCEDURE INDEX- **Act on Enabled Rules.** Certain enabled procedures must be applied here. (28 U.S.C. § 2072)

1. Rule of Evidence. Part of good lawmaking bears that clear proof and physical evidence have impact on outcome determinative adjudication. (*See* FED.R.EVID. *generally*.) In the Federalist Papers, all American citizens are warned to "guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment... by any impressions other than those which may result from the evidence of truth." (*See* The Federalist Papers, No. 1 Hamilton.) Here, prosecution satisfied the "beyond a reasonable doubt" burden of proof and even met the heightened "clear and convincing" evidentiary standard in obtaining conviction of Merrill Lynch, although the ***res ipsa loquitur*** doctrine would have permitted

inferences to be drawn from the best available circumstantial evidence. (*See Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993); *People v. Banks*, Colo.App., 655 P.2d 1384; *Lepre v. Caputo*, 131 N.J.Super. 118, 328 A.2d 650; *and* FED.R.EVID. Rule 1002.) In any event, the probative value of the investment contracts bore out over the course of NYSE trial supercedes and trumps Judge Gilmore who; did not look at the transcripts, wrongly elected to rely on false statements of Mr. Ballard, and did not conform its 'Orders' to the evidence as demonstrated in a letter to the 5th Circuit wherein the District Court did not even acknowledge the existence of a transcript. (*See* U.S.D.C. *letter of* 1 Sep. 2004.) Also, the 5th Circuit has not taken any action on an unopposed Rule 15 filing with attached EXHIBITS *STAMPED* by the Commission thereby circumventing execution of Claimant's due legal rights, powers, and privileges. (FED.R.APP.P.) Therefore, the lower Courts papers should not be given deference as legal judgments containing application of the law to the facts because they are simply not of that character. (R.)

2. Triers of Fact. The question presented in this short piece is whether the NYSE arbitration panel that consisted of both legal and securities experts are to have their unanimous decision upheld. The answer is found in Constitutional doctrine, whereby, although the Supreme Court shall have appellate review as to both Law and as to Fact, it is not privileged to overturn the trial forum's findings of fact and conclusions of law, or look behind the Judgment verdict absent some compelling justification that would render the decision clearly unreasonable. (*See* U.S. CONST. art. IV, § 1; *and Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077 (1943).) In this cause of action, Claimant's *Statement of Claim* was predicated by Civil Form JS 44 which established facts that: (1) the determinative ADR NYSE #1997-006647 trial on liability, (2) the federal question and diversity action over a $75,000,000 damage amount and delivery of stock certificates, and (3) the federal securities law case addressed securities exchange violations- all of which were decided in favor of the party Plaintiff and must be sustained. (*See* **CIVIL COVER SHEET** (Form JS 44) *of* 6 February 1998.) After all, Respondents proceed to contest but were rightly deemed the culpable loser. (28 U.S.C. §§ 1961, 1962, 1963)

3. Want of Assignments. Brokers are employed "to effect transactions in securities for the account of others," thereby facilitating rightful trades whereby "exchanging or converting securities or transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates" is handled. (15 U.S.C. §§ 78c(25), 78d-1) More, Title 15

U.S.C. § 78i mandates that warrants, rights, privileges, puts, calls, straddles, options or convertible securities shall not be manipulated when in fact Merrill Lynch has attempted to defraud the exchange and book-entry transfer of these transferable securities. (R.) Truth is however, that evidence of written assignments have not existed on the face of the governments papers wherefore "Every... paper shall be signed... by the party." (FED.R.CIV.P. Rule 11) Undeniably, the fact is that the lack of signatures invalidates, voids, and nullifies the written opinion of the Courts concerning the lack of stock transfers at issue here. (*See Reynolds v. Volunteer State Life Ins. Co.*, Tex.Civ. App., 80 S.W.2d 1087, 1092; *Klugh v. United States*, D.C.S.C., 620 F.Supp. 892, 901; *Easterline v. Bean*, 121 Tex. 327, 49 S.W.2d 427, 429.) This assertion stands firm as "there are few, if any, situations in our system of justice in which a single Judge is given unreviewable discretion over matters concerning a person's liberty or property." (*See* 5th Cir. Rule 27; *and Jones v. Barnes*, 463 U.S. 745, 751 (1983).)

SENTENCE ARGUMENT IN BRIEF CONCLUSION

XVII. MANDAMUS. Even if the federal judicial business consisted of nothing more than the combination of Constitutional interpretation and statutory law application, then Plaintiff would prevail on the contractual evidence alone, not to mention property ownership rights, much less Defendant's violation of legal grounds. (R.) Civil penalties were traditionally a type of remedy at common law that could only be used in Courts of Law as they were designed to punish culpable persons and not just extract compensation or restore the ***status quo***, but modern revelations demonstrate that Congress wanted the Courts to consider not only the need for retribution, but also the necessity for deterrence in addition to restitution when imposing civil punishments. (*See People v. Corcillo*, 195 Misc. 198, 88 N.Y.S.2d 534; *and Nording v. Johnston*, 205 Or. 315, 283 P.2d 994.) Thus, Courts are required to impose retribution for wrongful conduct based on; the seriousness of the violations, the number of prior and ongoing violations, and the total lack of good faith efforts on part of the blameful Defendant to comply with the relevant legal requirements. (*See* 15 U.S.C. § 78u-2 *et seq.*; *and Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987)) Any Court hearing the punishment phase in this case must also condition its deterrence of future violations by basing the penalty on its impact on Appellee, and in connection therewith section 77l clearly evidences that the law reflects more than a mere concern to supply equitable relief by setting the amount recoverable[17] at the offering price to the public of $700,000,000. (*See* 15 U.S.C. §

771(g); *and compare* Merrill Lynch & Co.'s *tombstone* ADP LYON™ Prospectus.) Here, the NYSE does not instruct that any punitive measures to be imposed on the convict Defendant's be decided only on the basis of equitable issues such as their unjust enrichment gained from violations of the laws, but rather only determined; liability on the counts of complaint, profit margin on the initial trade, and awarded a $7,500,000 balance in principal. (R.) For, indeed, "every final judgment shall grant the relief to which the party is whose favor it is rendered is entitled." (FED.R.CIV.P. Rule 54) Thus, the lower Court's indifference in adhering to the rules promotes tardiness in procedural performance and upsets the avowed purpose of the rules which is to achieve punctuality in the administration of justice. (*See Arnold v. Chicago, Burlington & Quincy R.R. Co.*, 7 F.R.D. 678, (D.Neb. 1947).) ***Pacta sundt servanda.***

PRAYER

XVIII. ***Ora pro nobis.*** With solemn respect, Appellant honestly prays; (1) for both legal and equitable relief, (2) that four Justices support a grant of certiorari, (3) for vacation and reversal of lower Court actions, (4) for strict plenary consideration in review, or simply for "***GVR***" where this case is processed in consideration of and consistent with the pertinent elements herein identified. (*See May v. Henderson*, 268 U.S. 111, 45 S.Ct. 456, 69 L.Ed. 870; *Stutson v. United States*, Ala.1996, 116 S.Ct. 600, 516 U.S. 193, 133 L.Ed.2d 571; *Lawrence v. Chater*, N.C.1996, 116 S.Ct. 604, 516 U.S. 163, 133 L.Ed.2d 545; *and Lords Landing Village v. Continental Ins. Co.*, Md.1997, 117 S.Ct. 1731, 520 U.S. 893, 138 L.Ed.2d 91.)***Votum***.

Respectfully Submitted,

J. NOLAN RENOBATO, Proprietor
Arbitrageur of Record, Petitioner
NOLAN NICHOLS & CO.
Post Office Box 9771
The Woodlands, Texas. 77387
(213) 364-8250 *business tel.*
INDUSTRIAL SYMBOL: ***JNR***
Arbitrage Firm

DATED: 9 November 2005

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17. NOTE: In the United States, actions to recover civil penalties customarily seek the statutory amount fixed by Congress. (*See e.g. Feltner v. Columbia Pictures Television Inc.*, 523 U.S. 340, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998).)

APPENDIX

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 CAMP STREET
NEW ORLEANS, LA 70130

August 9, 2005

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 04-20737 Renobato v. Merrill Lynch Pierce
USDC No. 4:98-CV-360

Enclosed order has been entered in this case.

Sincerely,

CHARLES R. FULBRUGE III, Clerk
By: "s/ Shirley M. Englehardt"

Shirley Engelhardt, Deputy Clerk
504-310-7631

Mr Jay Nolan Renobato
Mr Jack D Ballard

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20737

U.S. COURT OF APPEALS
FILED
AUG 9 - 2005
CHARLES R. FULBRUGE III
CLERK

JAY NOLAN RENOBATO

Plaintiff – Appellant

v.

MERRILL LYNCH PIERCE FENNER & SMITH INC, Broker Dealer; MERRILL LYNCH & COMPANY, Underwriter; MERRILL LYNCH PROFESSIONAL CLEARING CORP, Clearing Agent

Defendants – Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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PER CURIAM:

IT IS ORDERED that the motion of appellant asking the court to issue an order granting claimant's funds due plus simple interest thereon totaling $12,437,500 through 30 June 2005, and

simultaneously mandate delivery of securities certificates representing 31,499,550 shares of Automatic Data processing Inc. including accrued dividend distributions thereon since 28 November 2000 is DENIED;

IT IS FURTHER ORDERED that the motion of appellant to declare the miscreant appellee to be in contempt of court for their failure to perfectly tender the overdue funds and outstanding securities owed to plaintiff is DENIED;

IT IS FURTHER ORDERED that the motion of appellant to strike all of defense's papers that have defiled, marred, or corrupt signatures is DENIED; and

IT IS FURTHER ORDERED that the Clerk shall not accept (and shall return) any further filings or correspondence from appellant until after the court's decision is rendered in this case.

Charles R. Fulbruge, III

CHARLES R. FULBRUGE, III
CLERK OF COURT
Entered at the Direction of the Court

MOT-21

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAY NOLAN RENOBATO	§	
	§	
versus	§	CIVIL ACTION NO. H-98-0360
	§	
	§	
MERRILL LYNCH PIERCE FENNER AND SMITH INC., ET AL.	§	27

ORDER

IT IS HEREBY ORDERED that the above-captioned case shall be administratively closed. The parties are granted leave to move to reinstate the case on the Court's active docket after completion of the arbitration proceedings. A copy of this Order shall be attached as an exhibit to any motion to reinstate.

The clerk shall enter this Order and provide a copy to all parties.

SIGNED on June 9, 1998, at Houston, Texas.

"s/ Vanessa Gilmore"

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAY NOLAN RENOBATO	§	
	§	
Plaintiff,	§	
versus	§	CIVIL ACTION NO. H-98-0360
	§	
MERRILL LYNCH PIERCE FENNER AND SMITH INC., ET AL.	§	
	§	
Defendants,	§	

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion to Reinstate **(Instrument No. 39)** is **DENIED**.

Pending before the Court is Defendant's Motion for Entry of Judgment on Arbitration Award and Rule 11 Sanctions **(Instrument No. 40)** and Defendant's Motion for Entry of Judgment on Arbitration Award and Rule 11 Sanctions **(Instrument No. 41)**. Inasmuch as the Defendant's have specifically asked this Court not to reinstate this cause of action, the Court has no authority to grant any of the Motions filed by Defendants.

ACCORDINGLY, Defendant's motion are **DENIED** as moot.

The clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 10th day of December, 1998, at Houston, Texas.

"s/ Vanessa Gilmore"

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAY NOLAN RENOBATO	§	
	§	
Plaintiff,	§	
versus	§	CIVIL ACTION NO. H-98-0360
	§	
MERRILL LYNCH PIERCE FENNER AND SMITH INC., ET AL.	§	
	§	
Defendants,	§	

ORDER

Pending before the Court is Defendant's motion for reinstatement, for reconsideration of amended cross-motion for entry of judgment and for Rule 11 sanctions. (Instrument No. 44). The Court finds that Defendant's motion should be **GRANTED in PART and DENIED in PART.**

Pursuant to 9 U.S.C. § 9, the Court confirms the arbitration award issued by the NYSE arbitration panel on November 25, 1998. The arbitration award issued by the NYSE arbitration panel on November 25, 1998. The arbitration award was issued in favor of Plaintiff Jay Nola Renobato ("Renobato") and ordered Defendants to pay Renobato $3,900 in damages. The Court further awards post-judgment interest on the arbitration award in favor of Renobato at the rate of ten (10) percent per annum from November 25, 1998, until paid.

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The Court, however **DENIES** Defendant's request for Rule 11 sanctions, costs, and attorney fees. Any other relief requested by Defendants is also **DENIED**.

The clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 28th day of January, 1999, at Houston, Texas.

"s/ Vanessa Gilmore"

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

New York Stock Exchange **NYSE**
In the Matter of Arbitration Between

Case: Jay Nolan Renobato and Keith Stumbaugh v. Merrill Lynch Pierce Fenner Smith and Timothy S. Sutherland and Edward C. Anderson

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Attorneys:
For Claimant(s):

For Respondents:
Todd Zuckerbrod Esq. – New York, NY

Date Filed: 07/09/1997 First Scheduled: 01/09/1998 Decided: 11/25/1998

Case Summary: Claimant, a public customer, alleges respondents, a member firm and registered representatives, failed to follow instructions, engaged in unauthorized transactions and committed fraud with respect to Automated Data Processing subordinated noted and common stock.

Product: EQU Market: NYSE

Claim Data	**Award Data**
Claim: $7,500,000	Award: $3,900
Punitive: Uns	Punitive: $0.00
Atty Fees: $2,500	Atty Fees: $0.00
Deposit: $1,500	Costs: $0.00

Forum Fees: $4,800.00

Decision: The undersigned arbitrators have decided in full and final settlement of all claims between the parties that: The deferred motion to add additional parties is denied. Claimants are awarded the sum of $3,900.00 to be paid by Respondent Merrill Lynch. All claims against Timothy Sutherland and Edward Anderson are dismissed in their entirety. All appropriate reporting authorities with respect to this disputed matter are directed to expunge references to the claims asserted in this arbitration from the records of Messrs. Sutherland and Anderson, including the Form U-4 and CRD records. Each party shall bear its own costs and legal fees. The New York Stock Exchange forum fees of: $4,800.00, representing 3 hearing sessions and 1 pre-hearing conference, are assessed as follows: one half against Claimants and one half against Respondent Merrill Lynch. Interest on any amount due or payable under this award shall be at 10%

per annum commencing 30 days following the date of this award. All other relief not expressly granted herein is denied.

Remarks: Claimant was not represented by counsel and requested anonymity on the publicly available decision. Mr. Fidler presided over a pre-hearing telephone conference on January 5, 1998.

The undersigned arbitrators hereby affirm that they have executed this instrument which is their award:

Arbitrators: (D = Dissents)	Signatures:
James Milton Alexander	"s/ James M. Alexander"
Donald H. Fidler	"s/ Donald H. Fidler"
Antoinette M. Romano	"s/ Antoinette M. Romano"

City: Houston State: TX Date: 11/25/1998 Docket#: 1997-006647

NEW YORK STOCK EXCHANGE, INC.

DOCKET 31997-006647

IN THE MATTER OF ARBITRATION BETWEEN:

J. NOLAN RENOBATO and

VERSUS

MERRILL LYNCH PIERCE FENNER AND SMITH

- - - - -

ARBITRATION HEARING taken before Robert D. Carr, a Certified Shorthand Reporter in and for the State of Texas, at the Westin Oaks Hotel, 5011 Westheimer, Houston, Texas, ON THE 9TH DAY OF November, 1998, beginning at 9:30 a.m.

January 21, 1999 "s/ Robert D. Carr"

DATE ROBERT D. CARR, CSR

NOVEMBER 9, 1998

Arbitration Hearing of the New York Stock Exchange
November 9, 1998

APPEARANCES

THE ARBITRATORS:
DONALD H. FIDLER, ESQUIRE
Fidler & Marnock
Houston, Texas 77024
Member, Chairperson

JAMES MILTON ALEXANDER
Everen Securities
Houston, Texas 77010
Member, Securities Panel

ANTOINETTE M. ROMANO
Spring, Texas. 77397
Member, Non-Securities Panel

FOR THE CLAIMANT:
J. NOLAN RENOBATO, PRO SE
P.O. Box 9771
The Woodlands, Texas 77387
2310 Norfolk
No. 3
Houston, Texas 77098
713-522-0909 or 213-364-8250

FOR THE RESPONDENTS:
MERRILL LYNCH PIERCE FENNER & SMITH INC.
222 Broadway
16th Floor
New York, New York 10038
212-670-0374, FAX: 212-670-4530
By: Todd Zuckerbrod, Esquire

loss.

MR. RENOBATO: Pardon?

THE CHAIRPERSON: That these three parties that you seek to add have some participation that resulted in your loss.

MR. RENOBATO: Loss of what?

THE CHAIRPERSON: Well, you lost money didn't you?

MR. RENOBATO: No, sir. No, sir.

MR. ZUCKERBROD: Motion to go home. If he didn't lose money, then no damages, and we should all just go home.

THE CHAIRPERSON: All right. I saw a $7 million damage claim in here.

MR. RENOBATO: Again, they have confessed that there is a profit. And I yet to receive my money.

THE CHAIRPERSON: All right.

MR. RENOBATO: T Plus Three settlement occurs every day. To sit here any allow respondents Merrill Lynch to suggest that they, because they're a broker-dealer, can settle their trades T Plus Three every three days and that I can't is unfair.

In addition, it is a direct

THE CHAIRPERSON: All right. I understand you have a cash account. You had no margin account and the securities were not bought on margin?

MR. RENOBATO: Absolutely not. We did not request any loan from Merrill Lynch to purchase the securities.

THE CHAIRPERSON: We got a cash account. And I think I'm beginning to see - - to get a glimpse of what you're saying here. With this cash account, you sold short the stocks against 100 AUD?

MR. RENOBATO: Against the box. A long sale. Very standard. Long sales are routine in day-to-day broker dealer operations.

A. The cash account that's identified in a section, if you look at the top, it has Merrill Lynch - - I believe from their fax, one of the instruments they sent to counsel, Frank Pinedo.

THE CHAIRPERSON: What Document is it?

MR. RENOBATO: Twenty pages into that?

THE CHAIRPERSON: 4B011

MR. ZUCKERBROD: I believe we will

object for the record that it's hypothetical and speculative.

THE CHAIRPERSON: Well, we'll give it whatever weight we deem proper.

MR. RENOBATO: For the record, I would like to say that those estimates have nothing to do with any hypothetical or speculative estimate.

THE CHAIRPERSON: All right. Now then your total estimate of damages is $7,124,800.

MR. RENOBATO: Well, I do have additional bills from the attorneys – ex-SEC attorney, Frank Pinedo. Off the top of my mind, I really don't remember exactly where I --

THE CHAIRPERSON: There's a couple of bills in front of that.

MR. RENOBATO: Yes, sir. That might be a couple of the ones. But those are not the only cost – or that's not the extent of the damage. I have been forced to litigate the situation in order to effect some type of compliance with Respondent Merrill Lynch.

THE CHAIRPERSON: Litigation is not involved in your damages of this case here. This

Q. Okay. So they understood the nature of your transaction?

A. Well, from my position, I felt that I fully communicated the extent of the transaction as it would be completed. However, upon delivery and T Plus Three settlement, it became apparent, and after that time more obvious, that there would be no compliance.

Q. Okay. The firm that you originally purchased the securities from, RAS Securities?

A. Yes, Sir, RAS.

Q. Did you make any efforts to complete the other half of the arbitrage transaction with them?

A. Yes, sir. I indicated to Mr. Galvan that I was looking for a person who could sell the overlying option position. And since he specialized in OTC small cap stocks and is not a market maker or a dealer in the liquid yield option notes, he suggested that it would be easier for me to approach a dealer who maintained an inventory in the equity security to complete the transaction.

So I basically understood that as underwriter Merrill Lynch that they certainly had

STATE OF TEXAS

COUNTY OF HARRIS

REPORTER'S CERTIFICATION
TO THE HEARING TRANSCRIPT OF THE NEW YORK STOCK EXCHANGE
TAKEN ON NOVEMBER 9, 1998

I the undersigned certified shorthand reporter in and for the State of Texas, certify that the facts stated in the foregoing pages are true and correct.

I further certify that I am neither attorney or counsel for, related to nor employed by, any of the parties to the action in which this testimony was taken and, further, I am not a relative or employee of any counsel employed by the parties hereto, or financially interested in the action.

SUBSCRIBED AND SWORN TO under my hand and seal of office on this 21st day of January , 1999.

"s/ Robert D. Carr"

Robert D. Carr
Certified Shorthand Reporter
In and for the State of Texas

Certification no. 1600
Expiration Date: 12-31-99

TITLE 15 United States Code (1994)
COMMERCE AND TRADE
CHAPTER 2A- SECURITIES AND TRUST INDENTURES
SUBCHAPTER I-DOMESTIC SECURITIES

15 U.S.C. 77a. Short title

This title may be cited as the "Securities Act of 1933."

15 U.S.C. 77b. Definitions

When used in this title, unless the context otherwise requires-

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit –sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof) or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to a foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing.

(2)The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", or "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The terms defined in this paragraph and the term "offer to buy" as used in subsection (c) of section 77e of this title shall not include preliminary negotiations or agreements between an issuer (or any person directly or

indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer) and any underwriter or among underwriters who are or are to be in privity of contract with an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer). Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be an offer or sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

(4) The term "issuer" means every person who issues or proposes to issue any security or who guarantees a security either as to principle or income; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as the issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of

any interest in such right (whether whole or fractional) who creates fractional interests therein fo the purpose of public offering.

(5) The term "Commission" means the Securities and Exchange Commission.

(6) The term "Territory" means Puerto Rico, the Virgin Islands, and the insular possessions of the United States.

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 77f of this title, and includes any amendment thereto and any report, document, or memorandum filed as a part of such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale or confirms the sale of any security; except that (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 77j of this title) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 77j of this title at the time of[1] such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement letter, or communication in respect of a security shall not be deemed a prospectus if it states from whom a written prospectus meeting the requirements of section 77j of this title may be obtained and, in addition, does not more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the

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1. So in original.

protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to any issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under the direct or indirect common control of the issuer.

(12) The term "dealer" means any person who engages either for all or pat of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

TITLE 15 United Sates Code (1994)
COMMERCE AND TRADE
CHAPTER 2B- SECURITIES EXCHANGES

15 U.S.C. 78a. Short title

This chapter may be cited as the "Securities Exchange Act of 1934."

15 U.S.C. 78b. Necessity for regulation

For the reasons hereinafter enumerated, transactions iN securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for THE clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for

determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for banks loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of securities prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

15 U.S.C. 78c. Definitions and application

(a) Definitions.

When used in this chapter, unless the context otherwise requires-

(1) The term "exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that

term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(2) The term "facility" when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

(3)(A) The term "member" when used with respect to a national securities exchange means (i) any natural person permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, (ii) any registered broker or dealer with which such a natural person is associated, (iii) any registered broker or dealer permitted to designate as a representative such a natural person, and (iv) any other registered broker or dealer which agrees to be regulated by such exchange and with respect to which the exchange undertakes to enforce compliance with the provisions of this chapter, the rules and regulations thereunder, and its own rules. For purposes of sections 78f(b)(1), 78f(b)(4), 78f(b)(6), 78f(b)(7), 78f(d), 78q(d), 78s(d), 78s(e), 78s(g), 78s(h), and 78u of this title, the term "member" when used with respect to a national securities exchange also means, to the extent of the rules of the exchange specified by the Commission, any person required by the Commission to comply with such rules pursuant to section 78f(f) of this title.

(B) The term "member" when used with respect to a registered securities association means any registered broker or dealer who agrees to be regulated by such association and with respect to whom the association undertakes to enforce compliance with provisions of this title, the rules and regulations thereunder, and its own rules.

(4) The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.

(5) The term "dealer" means any person engaged in the business of buying and selling securities for his own account,

through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individual or in some fiduciary capacity, but not as a part of a regular business.

(6) The term "bank" means (A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C) any other banking institution, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to the first section 92a of title 12, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(7) The term "director" means any director of a corporation or any person performing similar functions with respect o any organization, whether incorporated or unincorporated.

(8) The term "issuer" means any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is, or is to be, used.

(9) The term "person" means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any

profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to a foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

(11) The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to o purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(12)(A) The term "exempted security" or "exempted securities" includes-

(i) government securities, as defined in paragraph (42) of this subsection;

(ii) municipal securities, as defined in paragraph (29) of this subsection

(iii) any interest or participation in any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian;

(iv) any interest or participation in a single trust fund, or a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which

interest, participation, or security is issued in connection with a qualified plan as defined in subparagraph (C) of this paragraph; and

(v) such other securities (which may include, among others, unregistered securities, the market in which is predominantly intrastate) as the Commission may, by such rules and regulations as it deems consistent with the public interest and the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this chapter which by their terms do not apply to an "exempted security" or to "exempted securities".

(B)(i) Notwithstanding subparagraph (A)(i) of this paragraph, government securities shall not be deemed to be "exempted securities" for the purposes of section 78q-1 of this title.

(ii) Notwithstanding subparagraph (A)(ii) of this paragraph, municipal securities shall not be deemed to be "exempted securities" for the purposes of sections 78o and 78q-1 of this title.

(C) For purposes of subparagraph (A)(iv) of this paragraph, the term "qualified plan" means (i) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of title 26, (ii) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code, or (iii) a governmental plan as defined in section 414(d) of such Code which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, other than any plan described in clause (i), (ii), or (iii) of this subparagraph which (I) covers employees some or all of whom are employees within the meaning of section 401(c) of title 26, or (II) is a plan funded by an annuity contract described in section 403(b) of such title 26.

(13) The terms "buy" and "purchase" each include any contract to buy, purchase, or otherwise, acquire.

(14) The term "sale" and "sell" each include any contract to sell or otherwise dispose of.

(15) The term "Commission" means the Securities and Exchange Commission established by section 78d of this title.

(16) The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(17) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof. The term also includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

(18) The term "person associated with a broker or dealer" or "associated person of a broker dealer" means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 15(b) of this title(other than paragraph 15(b) thereof.

(19) The terms "investment company", "affiliated person", "insurance company", "separate account", and "company" have the same meanings as in the Investment Company Act of 1940.

(20) The terms "investment advisor" and "underwriter" have the same meanings as in the Investment Company Act of 1940.

(21) The term "person associated with a member" or "associated person of a member" when used with respect to a member of a national securities exchange or registered securities association means any partner, officer, director, or branch manager of such member (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such member, or any employee of such member.

(22)(A) The term "securities information processor" means any person engaged in the business of (i) collecting, processing, or

preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security (other than an exempted security) or (ii) distributing or publishing (whether by means of a ticker tape, a communication network, a terminal display device, or otherwise) on a current and continuing basis, information with respect to such transactions or quotations. The term "securities information processor" does not include any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation, any self-regulatory organization, and bank, broker, dealer, building and loan, savings and loan, or homestead association, or cooperative bank, if such bank, broker, dealer, building and loan, savings and loan, or homestead association, or cooperative bank would be deemed to be a securities information processor solely by reason of functions performed by such institutions as part of customary banking, brokerage, dealing, association, or cooperative bank activities, or any common carrier, as defined in section 153(t) of title 47, subject to the jurisdiction of the Federal Communications Commission or a State commission as defined in section 153(t) of title, unless the Commission determines that such carrier is engaged in the business of collecting, processing, or preparing for distribution or publication, information with respect to transactions in or quotations for any security.

(B) The term "exclusive processor" means any securities information processor or self-regulatory organization which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association which engages on an exclusive basis on its own behalf, in collecting, processing, or preparing for distribution or publication any information with respect to (i) transactions or quotations on or effected or made means of any facility of such exchange or (ii) quotations distributed or published by means of any electronic system operated or controlled by such association.

(23)(A) The term "clearing agency" means any person who acts as an intermediary in making payments or deliveries or both in connections with transactions in securities or who provides facilities comparison of data respecting the terms of

settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities. Such term also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.

(B) The term "clearing agency" does not include (i) any Federal Reserve bank, Federal home loan bank, or Federal land bank; (ii) any national securities exchange or registered securities association solely by reason of its providing facilities for comparison of data respecting the terms of settlement of securities transactions effected on such exchange or by means of any electronic system operated or controlled by such association; (iii) any bank, broker, dealer, building and loan, savings and loan, or homestead association, or cooperative bank if such bank, broker, dealer, association, or cooperative bank would be deemed to be a clearing agency solely be reason of functions performed by such institution as part of customary banking, brokerage, dealing, association, or cooperative banking activities, or solely by reason of acting on behalf of a clearing agency or a participant therein in connection with the furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants, unless the Commission, by rule, otherwise provides as necessary or appropriate to assure prompt and accurate clearance and settlement of securities transactions or to prevent evasion of this chapter; (iv) any life insurance company, its registered separate accounts, or a subsidiary of such insurance company solely by reason of functions commonly performed by such entities in connection with variable annuity contracts or variable life policies issued by such insurance company or its separate accounts; (v) any registered open-end investment company or unit investment trust solely be reason of functions commonly

performed by it in connection with shares in such registered open-end investment company or unit investment trust, or (vi) any person solely by reason of its functions described in paragraph 25(E) of this subsection.

(24) The term "participant" when used with respect to a clearing agency means any person who uses a clearing agency to clear or settle securities transactions or to transfer, pledge, lend, or hypothecate securities. Such term does not include a person whose only use of a clearing agency is (A) through another person who is a participant or (B) as a pledgee of securities.

(25) The term "transfer agent" means any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates. The term "transfer agent" does not include any insurance company or separate account which performs such functions solely with respect to variable annuity contracts or variable life policies which it issues or any registered clearing agency which performs such functions solely with respect to options contracts which it issues.

(26) The term "self-regulatory organization" means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 19(b), 19(c), and 23(b) of this title) the Municipal Securities Rulemaking Board established by section 15B of this title.

(27) The term "rules of an exchange", "rules of an association", or "rules of a clearing agency" means the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing, of an exchange, association of brokers and dealers, or clearing agency, respectively, and such of the stated policies, practices, and interpretations of such exchange, association, or clearing agency as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be the rules of such exchange, association, or clearing agency.

(28) The term "rules of a self-regulatory organization" means the rules of an exchange which is a national securities exchange, the rules of an association of brokers and dealers which is a registered securities association, the rules of a clearing agency which is a registered clearing agency, or the rules of the Municipal Securities Rulemaking Board.

(29) The term "municipal securities" means securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States, or any security which is an industrial development bond (as defined in Section 103(c)(2)[1] of title 26) the interest on which is excludable from gross income under section 103(a)(1)[1] of title 26 if, by reason of the application of paragraphs (4) or (6) of section 103(c)[1] of title 26 (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)),[1] paragraph (1) of such section 103(c)[1] does not apply to such security.

(30) The term "municipal securities dealer" means any person (including a separately identifiable department or division of a bank) engaged in the business of buying and selling municipal securities for his own account, through a broker or otherwise, but does not include-

(A) any person insofar as he buys or sells such securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business; or

(B) a bank, unless the bank is engaged in the business of buying and selling municipal securities for its own account other than in a fiduciary capacity, through a broker or otherwise; *Provided, however,* That the bank is engaged in such business though a separately identifiable department or division (as defined by the Municipal Securities Rulemaking Board in accordance with section 15B(b)(2)(H) of this title), the department or division and not the bank itself shall be deemed to be the municipal securities dealer.

(31) The term "municipal securities broker" means a broker engaged in the business of effecting transactions in municipal securities for the account of others.

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1. See References in Text note below.

(32) The term "person associated with a municipal securities dealer" when used with respect to a municipal securities dealer which is a bank or a division or department of a bank means any person directly engaged in the management, direction, supervision, or performance of any of the municipal securities dealer's activities with respect to municipal securities, and any person directly or indirectly controlling such activities or controlled by the municipal securities dealer in connection with such activities.

(33) The term "municipal securities investment portfolio" means all municipal securities held for investment and not for sale as a part of a regular business by a municipal securities dealer or by a person, directly or indirectly, controlling, controlled by, or under common control with a municipal securities dealer.

(34) The term "appropriate regulatory agency" means-

(A) When used with respect to a municipal securities dealer

(i) the Comptroller of the Currency, in the case of a national bank or a bank operating under the Code or Law for the District of Columbia, or a subsidiary or a department or division of any such bank;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary or a department or division thereof, a bank holding company, a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a subsidiary or a department or division of such subsidiary;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member the Federal Reserve System), or a subsidiary or department or division thereof; and

(iv) the Commission in the case of all other municipal securities dealers.

(B) When used with respect to a clearing agency or transfer agent

(i) the Comptroller of the Currency, in the case of a national bank or a bank operating under the Code or Law

for the District of Columbia, or a subdivision of any such bank;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary thereof, a bank holding company, or a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a subsidiary or a department or division of such subsidiary;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member the Federal Reserve System), or a subsidiary thereof; and

(iv) the Commission in the case of all other clearing agencies and transfer agents.

(C) When used with respect to a participant or applicant to become a participant in a clearing agency or a person requesting or having access to services offered by a clearing agency;

(i) the Comptroller of the Currency, in the case of a national bank or a bank operating under the Code or Law for the District of Columbia when the appropriate regulatory agency for such clearing agency is not the Commission;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary thereof, a bank holding company, or a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i) or (iii) of this subparagraph when the appropriate regulatory agency for such clearing agency is not the Commission;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member the Federal Reserve System) when the appropriate regulatory agency for such clearing agency is not the Commission; and

(iv) the Commission in all other cases.

(D) When used with respect to an institutional investment manager which is a bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act:

(i) the Comptroller of the Currency, in the case of a national bank or a bank operating under the Code or Law for the District of Columbia;

(ii) the Board of Governors of the Federal Reserve System, in the case of any other member bank of the Federal Reserve System; and

(iii) the Federal Deposit Insurance Corporation, in the case of any other insured bank.

(E) When used with respect to a national securities exchange or registered securities association, member thereof, person associated with a member thereof, applicant to become a member thereof or to become associated with a member thereof, or person requesting or having access to services offered by such exchange or association or member thereof, or the Municipal Securities Rulemaking Board, the Commission.

(F) When used with respect to a person exercising investment discretion with respect to an account;

(i) the Comptroller of the Currency, in the case of a national bank or a bank operating under the Code of Law for the District of Columbia;

(ii) the Board of Governors of the Federal Reserve System in the case of any other member bank of the Federal Reserve System;

(iii) the Federal Deposit Insurance Corporation, in the case of any other bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act; and

(iv) the Commission in the case of all other such persons.

(G) When used with respect to a government securities broker or government securities dealer, or person associated with a government securities broker or government securities dealer:

(i) the Comptroller of the Currency, in the case of a national bank, a bank in the District of Columbia examined by the Comptroller of the Currency, or a Federal branch or Federal agency of a foreign bank (as such terms are used in the International Banking Act of 1978 [12 U.S.C. 3101 et seq.]);

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve

System, a foreign bank, an uninsured State branch or State agency of a foreign bank, a commercial lending company owned or controlled by a foreign bank (as such terms are used in the International Banking Act of 1978), or a corporation organized or having an agreement with the Board of Governors of the Federal Reserve System pursuant to the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.];

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System or a Federal savings bank) or an insured State branch of a foreign bank (as such terms are used in the International Banking Act of 1978);

(iv) the Director of the Office of Thrift Supervision, in the case of a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act [12 U.S.C. 1813(b)]) the deposits of which are insured by the Federal Deposit Insurance Corporation[2];

(v) the Commission, in the case of all other government securities brokers and government securities dealers.

As used in this paragraph, the terms "bank holding company" and "subsidiary of a bank holding company" have the meanings given them in section 1841 of title 12, and the term "District of Columbia savings and loan association" means any association subject to examination and supervision by the Office of Thrift Supervision under section 1466a of title 12.

(35) A person exercises "investment discretion" with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of

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[2] So in original. Probably should be followed by "and".

the provisions of this title and the rules and regulations thereunder.

(36) A class of persons or markets is subject to "equal regulation" if no member of the class has a competitive advantage over any other member thereof resulting from a disparity in their regulation under this title which the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of this title.

(37) The term "records" means accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language.

(38) The term "market maker" means any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.

(39) A person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self-regulatory organization, if such person-

(A) has been and is expelled or suspended from membership or participation in, or bared or suspended from being associated with a member of, any self-regulatory organization, foreign equivalent of a self-regulatory organization, foreign or international securities exchange, contract market designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7), or any substantially equivalent foreign statute or regulation, or futures association registered under section 17 of such Act (7 U.S.C. 21), or any substantially equivalent foreign statute or regulation, or has been and is denied trading privileges on any such contract market or foreign equivalent;

(B) is subject to-

(i) an order to the Commission, other appropriate regulatory agency, or foreign financial regulatory authority-

(I) denying, suspending for a period not exceeding 12 months, or revoking his registration as a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer or limiting his

activities as a foreign person performing a function substantially equivalent to any of the above; or

(II) barring or suspending for a period not exceeding 12 months his being associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer or foreign person performing a function substantially equivalent to any of the above;

(ii) an order of the Commodity Futures Trading Commission denying, suspending, or revoking his registration under the Commodity Exchange Act (7 U.S.C. 1 et seq.); or

(iii) an order by a foreign financial regulatory authority denying, suspending, or revoking the person's authority to engage in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof;

(C) by his conduct while associated with a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer or while associated with an entity or person required to be registered with under the Commodity Exchange Act, has been found to be a cause of any effective suspension, expulsion, or order of the character described in subparagraph (A) or (B) of this paragraph, and in entering such a suspension, expulsion, or order, the Commission, an appropriate regulatory agency, or any such self-regulatory organization shall have jurisdiction to find whether or not any person was a cause thereof;

(D) by his conduct while associated with any broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or any other entity engaged in transactions in securities, or while associated with an entity engaged in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof, has been found to be a cause of any effective suspension, expulsion, or order by a foreign or international securities exchange or foreign financial regulatory authority

empowered by a foreign government to administer or enforce its laws relating to financial transactions as described in subparagraph (A) or (B) of this paragraph;

(E) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person described by subparagraph (A), (B), (C), or (D) of this paragraph; or

(F) has committed or omitted any act enumerated in subparagraph (D), (E), or (G) of paragraph (4) of section 78o(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) or any other felony within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization, is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4), has willfully made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, report required to be filed with a self-regulatory organization, or proceeding before a self-regulatory organization, any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein.

(40) The term "financial responsibility rules" means the rules and regulations of the Commission or the rules and regulations prescribed by any self-regulatory organization relating to financial responsibility and related practices which are designated by the Commission, by rule or regulation, to be financial responsibility rules.

(41) The term "mortgage related security" means a security that is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization, and either:

(A) represents ownership of one or more promissory notes or certificates of interest or participation in such notes (including any rights designed to assure servicing of, or the receipt or timeliness of receipt by the holders of such notes, certificates, or

participations of amounts payable under, such notes, certificates, or participations), which notes:

(i) are directly secured by a first lien on a single parcel of real estate, including stock allocated to a dwelling unit in a residential cooperative housing corporation, upon which is located a dwelling or mixed residential and commercial structure, on a residential manufactured home as defined in section 5402(6) of title 42, whether such manufactured home is considered real or personal property under the laws of the State in which it is to be located or on one or more parcels of real estate upon which is located one or more commercial structures; and

(ii) were originated by a savings and loan association, savings bank, commercial bank, credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or by a mortgagee approved by the Secretary of Housing and Urban Development pursuant to sections 1709 and 1715b of title 12, or, where such notes involve a lien on the manufactured home, by any such institution or by any financial institution approved for insurance by the Secretary of Housing and Urban Development pursuant to section 1793 of title 12; or

(B) is secured by one or more promissory notes or certificates of interest or participations in such notes (with or without recourse to the issuer thereof) and, by its terms, provides for payments of principal and in relation to payments, or reasonable projections of payments, on notes meeting the requirements of subparagraphs (A)(i) and (ii) or certificates of interest or participations in promissory notes meeting such requirements. For the purpose of this paragraph, the term "promissory note", when used in connection with a manufactured home, shall also include a loan, advance, or credit sale as evidence[3] by a retail installment sales contract or other instrument.

(42) The term "government securities" means-

(A) securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States;

(B) securities which are issued or guaranteed by corporations in which the United States has a direct or indirect interest and which

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3. So in original. Probably should be "evidenced".

are designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors;

(C) securities issued or guaranteed as to principal or interest by any corporation the securities of which are designated, by statute specifically naming such corporation, to constitute exempt securities within the meaning of the laws administered by the Commission; or

(D) for purposes of section 78o-5 and 78q-1 of this title, any put, call, straddle, option, or privilege on a security described in subparagraph (A), (B), or (C) other than a put, call, straddle, option, or privilege-

(i) that is traded on one or more national securities exchanges; or

(ii) for which quotations are disseminated through an automated quotation system operated by a registered securities association.

(43) The term "government securities broker" means any person regularly engaged in the business of effecting transactions in government securities for the account of others, but does not include-

(A) any corporation the securities of which are government securities under subparagraph (B) or (C) of paragraph (42) of this subsection; or

(B) any person registered with the Commodity Futures Trading Commission, any contract market designated by the Commodity Futures Trading Commission, such contract market's affiliated clearing organization, or any floor trader on such contract market, solely because such person effects transactions in government securities that the Commission, after consultation with the Commodity Futures Trading Commission, has determined by rule or by order to be incidental to such person's futures-related business.

(44) The term "government securities dealer" means any person engaged in the business of buying and selling government securities for his own account, through a broker or otherwise, but does not include-

(A) any person insofar as he buys or sells such securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business;

(B) any corporation the securities of which are government securities under subparagraph (B) or (C) of paragraph (42) of this subsection;

(C) any bank, unless the bank is engaged in the business of buying and selling government securities for its own account other than in a fiduciary capacity, through a broker or otherwise; or

(D) any person registered with the Commodity Futures Trading Commission, any contract market designated by the Commodity Futures Trading Commission, such contract market's affiliated clearing organization, or any floor trader on such contract market, solely because such person effects transactions in government securities that the Commission, after consultation with the Commodity Futures Trading Commission, has determined by rule or order to be incidental to such person's futures-related business.

(45) The term "person associated with a government securities broker or government securities dealer" means any partner, officer, director, or branch manager of such government securities broker or government securities dealer (any person occupying a similar status or performing similar functions), and any other employee of such government securities broker or government securities dealer who is engaged in the management, direction, supervision, or performance of any activities relating to government securities, and any person directly or indirectly controlling, controlled by, or under common control with such government securities broker or government securities dealer.

(46) The term "financial institution" means-

(A) a bank (as defined in paragraph (6) of this subsection);

(B) a foreign bank (as such term is used in the International Banking Act of 1978); and

(C) a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act) the deposits of which are insured by the Federal Deposit Insurance Corporation.

(47) The term "securities laws" means the Securities Act of 1933 (15 U.S.C. 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.)[15 U.S.C. 79 et seq.], the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), the Investment Advisors Act of 1940

(15 U.S.C. 80b et seq.)[15 U.S.C. 80b-1 et seq.], and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.).

(48) The term "registered broker or dealer" means a broker or dealer registered or required to register pursuant to section 78o or 78o-4 of this title, except that in paragraph (3) of this subsection and sections 78f and 78o-3 of this title the term means such a broker or dealer and a government securities broker or government securities dealer registered or required to register pursuant to section 78o-5(a)(1)(A) of this title.

(49) The term "person associated with a transfer agent" and "associated person of a transfer agent" mean any person (except an employee whose functions are solely clerical or ministerial) directly engaged in the management, direction, supervision, or performance of any of the transfer agent's activities with respect to transfer agent functions, and any person directly or indirectly controlling such activities or controlled by the transfer agent in connection with such activities.

(50) The term "foreign securities authority" means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(51)(A) The term "penny stock" means any equity security, other than a security that is-

(i) registered or approved for registration and traded on a national securities exchange that meets such criteria as the Commission shall prescribe by rule or regulation for purposes of this paragraph;

(ii) authorized for quotations on an automated quotation system sponsored by a registered securities association, if such system (I) was established and in operation before January 1, 1990, and (II) meets such criteria as the Commission shall prescribe by rule or regulation for purposes of this paragraph;

(iii) issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.];

(iv) excluded, on the basis of exceeding a minimum price, net tangible assets of the issuer, or other relevant criteria, from the definition of such term by rule or regulation which the Commission shall prescribe for purposes of this paragraph; or

(v) exempted, in whole or in part, conditionally or unconditionally, from the definition of such term by rule, regulation, or order prescribed by the Commission.

(B) The Commission may, by rule, regulation, or order, designate any equity security or class of equity securities described in clause (i) or (ii) of subparagraph (A) as within the meaning of the term "penny stock" if such security or class of securities is traded other than on a national securities exchange or through an automated quotation system described in clause (ii) of subparagraph (A).

(C) In exercising its authority under this paragraph to prescribe rules, regulations, and orders, the Commission shall determine that such rule, regulation, or order is consistent with the public interest and the protection of investors.

(52) The term "foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rule of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above.

(53)(A) The term "small business related security" means a security that is rated in 1 of the 4 highest rating categories by at least 1 nationally recognized statistical rating organization, and either-

(i) represents an interest in 1 or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company; or

(ii) is secured by an interest in 1 or more promissory notes or leases of personal property (with or without recourse to the issuer or lessee) and provides for payments of principal in

relation to payments, or reasonable projections of payments, on notes or leases described in clause (i).

(B) For purposes of this paragraph-

(i) an "interest in a promissory note or a lease of personal property" includes ownership rights, certificates of interest or participation in such notes or leases, and rights designed to assure servicing of such notes or leases, or the receipt or timely receipt of amounts payable under such notes or leases;

(ii) the term "small business concern" means a business that meets the criteria for a small business concern established by the Small Business Administration under section 3(a) of the Small Business Act;

(iii) the term "insured depository institution" has the same meaning as in section 3 of the Federal Deposit Insurance Act; and

(iv) the term "insured credit union" has the same meaning as in section 101 of the Federal Credit Union Act.

(b) Power to define technical, trade, accounting, and other terms

The Commission and Board of Governors of the Federal Reserve System, as to matters withi their respective jurisdictions, shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this title, consistently with the provisions and purposes of this chapter.

(c) Application to governmental departments or agencies.

No provision of this title shall apply to, or be deemed to include, any executive department or independent establishment of the United States, or any lending agency which is wholly owned, directly or indirectly, by the United States, or any officer, agent, or employee of any such department, establishment, or agency, acting in the course of his official duty as such, unless such provision makes specific reference to such department, establishment, or agency.

(d) Issuers of municipal securities.

No issuer of municipal securities or officer or employee thereof acting in the course of his official duties as such shall be deemed to be a "broker", "dealer", or "municipal securities dealer" solely by reason of buying, selling, or effecting transactions in the issuer's securities.

Title 12 Code of Federal Regulations
Section 220 Credit by Brokers and Dealers
"Regulation T"

SECTION 220.1-Authority, Purpose, and Scope

(a) *Authority and purpose*. Regulation T (this part)* is issued by the Board of Governors of the Federal Reserve System (the Board) pursuant to the Securities Exchange Act of 1934 (the act)(15 USC 78a et seq.). Its principal purpose is to regulate extensions of credit by and to brokers and dealers; it also covers related transactions within the Board's authority under the act. It imposes, among other obligations, initial margin requirements and payment rules on securities transactions.

(b) *Scope*.

(1) This part provides a margin account and eight special-purpose accounts in which to record all financial relations between a customer and a creditor. Any transaction not specifically permitted in a special account shall be recorded in a margin account.

(2) This part does not preclude any exchange, national securities association, or creditor from imposing additional requirements or taking action for its own protection.

(3) This part does not apply to transactions between a customer and a broker or dealer registered only under section 15C of the act.

SECTION 220.2-Definitions

The terms used in this part have the meanings given them in section 3(a) of the act or as defined in this section.

Cash equivalent means securities issued or guaranteed by the United States or its agencies, negotiable bank certificates of deposit, banker's acceptances issued by banking institutions in the United States and payable in the United States, or money market mutual funds.

Covered option transaction means-

(1) in the case of a short call, the underling asset (or a security immediately convertible into the underlying asset, without the

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* Code of Federal Regulations, title 12, chapter II, part 220.

payment of money) is held in or purchased for the account on the same day, and the option premium is held in the account until cash payment for the underlying asset or convertible security is received; or

(2) in the case of a short put, the creditor obtains cash in an amount equal to the exercise price or holds in the account cash equivalents with a current market value at least equal to the exercise price and, except in the case of money market mutual funds, with one year or less to maturity; or

(3) in the case of a short put or short call, the creditor verifies that the appropriate escrow agreement will be delivered to the creditor promptly and the option premium is held in the account until such delivery is made; or

(4) beginning June 1, 1997, any other transaction involving options or warrants in which the customer's risk is limited and all elements of the transaction are subject to comtemporaneous exercise if-

(i) the amount at risk is held in the account in cash, cash equivalents, or via an escrow receipt; and

(ii) the transaction is eligible for the cash account by the rules of the registered national securities exchange authorized to trade the option or warrant or by the rules of the creditor's examining authority in the case of an unregistered option, provided that all such rules have been approved or amended by the SEC.

Credit balance means the cash amount due the customer in a margin account after debiting amounts transferred to the special memorandum account.

Creditor means any broker or dealer (as defined in sections 3(a)(4) and 3(a)(5) of the act), any member of a national securities exchange, or any person associated with a broker or dealer (as defined in section 3(a)(18) of the act), except for business entities controlling or under common control with the creditor.

Customer includes-

(1) any person or persons acting jointly-

(i) to or for whom a creditor extends, arranges, or maintains any credit; or

(ii) who would be considered a customer of the creditor according to the ordinary usage of the trade;
(2) any partner in a firm who would be considered a customer of the firm absent the partnership relationship, and
(3) any joint venture in which a creditor participates and which would be considered a customer of the creditor if the creditor were not a participant.

Debit balance means the cash amount owed to the creditor in a margin account after debiting amounts transferred to the special memorandum account.

Delivery against payment, payment against delivery, or a *COD transaction* refers to an agreement under which a creditor and a customer agree that the creditor will deliver to, or accept from, the customer, or the customer's agent, a security against full payment of the purchase price.

Equity means the total current market value o security positions held in the margin account plus any credit balance less the debit balance in the margin account.

Escrow agreement means any agreement issued in connection with a call or put option under which a bank or any person designated as a control under paragraph (c) of SEC Rule 15c3-3 (17 CFR 240.15c3-3(c)), holding the underlying asset or required cash or cash equivalents, is obligated to deliver to the creditor (in the case of a call option) or to accept from the creditor (in the case of a put option) the underlying asset or required cash or cash equivalent against payment of the exercise price upon exercise of the call or put.

Examining authority means-
(1) the national securities exchange or national securities association of which a creditor is a member; or
(2) if a member of more than one self-regulatory organization, the organization designated by the SEC as the examining authority for the creditor.

Exempted securities mutual fund means any security issued by an investment company registered under section 8 of the Investment Company Act of 1940 (15 USC 80a-8), provided the company has at least 95 percent of its assets continuously invested in exempt securities (as defined in section 3(a)(12) of the act).

Foreign margin stock means a foreign security that is an equity security and that appears on the Board's periodically published list of foreign margin stocks.

Foreign person means a person other than a United States person as defined in section 7(f) of the act.

Foreign security means a security issued in a jurisdiction other that the United States.

Good faith margin means the amount of margin which a creditor, exercising sound credit judgment, would customarily require for a specified security position and which is established without regard to the customer's other assets or securities positions held in connection with unrelated transactions.

In or at the money means, until June 1, 1997, the current market price of the underlying security is not more than one standard exercise interval below (with respect to a call option) or above (with respect to a put option) the exercise price of the option.

In the money means the current market price of the underlying asset or index is not below (with respect to a call option) or above (with respect to a put option) the exercise price of the option.

Margin call means a demand by a creditor to a customer for a deposit of additional cash or securities to eliminate or reduce a margin deficiency as required under this part.

Margin deficiency means the amount by which the required margin exceeds the equity in the margin account.

Margin excess means the amount by which the equity in the margin account exceeds the required margin. When the margin excess is

represented by securities, the current value of the securities is subject to the percentages set forth in section 220.18 (the supplement).

Margin security means-
(1) any registered security;
(2) any OTC margin stock;
(3) any OTC margin bond;
(4) any OTC security designated as qualified for trading in the national market system under a designation plan approved by the Securities and Exchange Commission (NMS security);
(5) any security issued by either an open-end investment company or unit investment trust which registered under section 8 of the Investment Company Act of 1940 (15 USC 80a-8);
(6) any foreign margin stock; or
(7) any debt security convertible into a margin security.

Money market mutual fund means any security issued by an investment company registered under section 8 of the Investment Company Act of 1940 (15 USC 80a-8) that is considered a money market fund under SEC Rule 2a-7 (17 CFR 220.2a-7).

Nonexempted security means any security other than an exempted security (as defined in section 3(a)(12) of the act).

Nonmember bank means a bank that is not a member of the Federal Reserve System.

Non-U.S.-traded foreign security means a foreign security that is neither a registered security nor one listed on NASDAQ.

OTC margin bond means-
(1) a debt security not traded on a national securities exchange which meets all of the following requirements:

(i) at the time of original issue, a principal amount of not less that $25,000,000 of the issue was outstanding;
(ii) the issue was registered under section 5 of the Securities Act of 1933 (15 USC 77e) and the issuer either files periodic reports pursuant to section 13(a) or 15(d) of the act or is an

insurance company which meets all of the conditions specified in section 12(g)(2)(G) of the act; and

(iii) at the time of the extension of credit, the creditor has a reasonable basis for believing that the issuer is not in default on interest or principal payments; or

(2) a private pass-through security (not guaranteed by an agency of the U.S. government) meeting all of the following requirements:

(i) an aggregate principal amount of not less than $25,000,000 (which may be issued in series) was issued pursuant to a registration statement filed with the SEC under section 5 of the Securities Act of 1933 (15 USC 77e);

(ii) current reports relating to the issue have been filed with the SEC; and

(iii) at the time of the credit extension, the creditor has a reasonable basis for believing that mortgage interest, principal payments and other distributions are being passed through as required and that the servicing agent is meeting its material obligations under the terms of the offering; or

(3) a mortgage-related security as defined in section 3(a)(41) of the act; or

(4) a debt security issued or guaranteed as a general obligation by the government of a foreign country, its provinces, states, or cities, or a supranational entity, if at the time of the extension of credit one of the following is rated in one of the two highest rating categories by a nationally recognized statistical rating organization:

(i) the issue,

(ii) the issuer or guarantor (implicitly), or

(iii) other outstanding unsecured long-term debt securities issued or guaranteed by the government or entity; or

(5) a foreign security that is a nonconvertible debt security that meets all of the following requirements;

(i) at the time of original issue, a principal amount of at least $100,000,000 was outstanding;

(ii) at the time of the extension of credit, the creditor has a reasonable basis for believing that the issuer is not in default on interest or principal payments; and

(iii) at the time of extension of credit, the issue rated on one of the two highest rating categories by a nationally recognized statistical rating organization; or

(6) any nonconvertible debt security that meets all of the following requirements;

(i) at the time of the extension of credit, the creditor has a reasonable basis for believing that the issuer is not in default on interest or principal payments; and

(ii) at the time of extension of credit, the issue is rated in one of the four highest rating categories by a nationally recognized statistical rating organization.

OTC margin stock means any equity security traded over the counter that the Board has determined has the degree of national investor interest, the depth and breadth of market, the availability of information respecting the security and its issuer, and the character and permanence of the issuer to warrant being treated like an equity security traded on a national securities exchange. An OTC stock is not considered to be an OTC margin stock unless it appears of the Board's periodically published list of OTC margin stocks.

Overlying option means-

(1) a put option purchased or a call option written against a long position in an underlying asset in the specialist record in section 220.12(b); or

(2) a call option purchased or a put option written against a short position in an underlying asset in the specialist record in section 220.12(b).

Payment period means the number of business days in the standard securities settlement cycle in the United States, as defined in paragraph (a) of SEC Rule 15c6-1 (17 CFR 240.15c6-1(a)), plus two business days.

Permitted offset position means, in the case of an option in which a specialist makes a market, a position in the underlying asset or other related assets, and in the case of other securities in which a specialist makes a market, a position in options overlying the securities in which a specialist makes a market, provided the positions qualify as permitted offsets under the rules of the national securities exchange which the specialist is registered, and further provided all such rules have been approved or amended by the

SEC. Until June 1, 1997, permitted offsets are determined by reference to section 220.12(b)(6).

Purpose credit means credit for the purpose of-
(1) buying, carrying, or trading in securities; or
(2) buying or carrying any part of an investment contract security which shall be deemed credit for the purpose of buying or carrying the entire security.

Registered security means any security that-
(1) is registered on a national securities exchange; or
(2) has unlisted trading privileges on a national securities exchange.

Short call or short put means a call option or a put option that is issued, endorsed, or guaranteed in or for an account.
(1) A short call that is not cash-settled obligates the customer to sell the underlying asset at the exercise price upon receipt of a valid exercise notice or as otherwise required by the option contract.
(2) A short put that is not cash-settled obligates the customer to purchase the underlying asset at the exercise price upon receipt of a valid exercise notice or as otherwise required by the option contract.
(3) A short call or a short put that is cash-settled obligates the customer to pay the holder of an in-the-money long put or long call who has, or has been deemed to have, exercised the option the cash difference between the exercise price and the current assigned value of the option as established by the option contract.

Specialist joint account means an account which, by written agreement, provides for the commingling of the security positions of the participants and a sharing of profits and losses from the account on some predetermined ratio.

Underlying asset means-
(1) the security or other asset that will be delivered upon exercise of an option; or
(2) in the case of a cash-settled option, the securities or other assets which comprise the index or other measure from which the option's value is derived.

Title 12 Code of Federal Regulations
Section 220 Credit by Brokers and Dealers
"Regulation T"

SECTION 220.7- Arbitrage Account

In an arbitrage account a creditor may effect and finance for any customer bone fide arbitrage transactions. For purposes of this section, the term "bona fide arbitrage" means-

(a) a purchase or sale of a security in one market together with an offsetting sale or purchase of the same security in a different market at as nearly the same time as practicable for the purpose of taking advantage of a difference in prices in the two markets; or

(b) a purchase or sale of a security which is, without restriction other than the payment of money, exchangeable or convertible within 90 calendar days of the purchase into a second security together with an offsetting sale of the second security at or about the same time, for the purpose of taking advantage of a concurrent disparity in the prices of the two securities.

DELAWARE SECURITIES ACT
Title 6, Chapter 73

Sec. 7301. Short title- Purpose. (a) This chapter shall be known and may be cited as the "Delaware Securities Act."

(b) The purpose of the Delaware Securities Act is to prevent the public from being victimized by unscrupulous or overreaching broker-dealers, investment advisers or agents in the context of selling securities or giving investment advice, as well as to remedy any harm caused by securities law violations. This prophylactic and remedial purpose shall be deemed of paramount importance in the interpretation of the provisions of this Act and particularly in any judicial review of sanctions or penalties imposed by the Securities Commissioner and of motions or requests by persons affected to stay such sanctions or penalties.
[Sec. 7301 last amended by Laws 1991, Ch. 181, approved July 17, 1991, effective August 16, 1991.]

Sec. 7302. Definitions. (a) *Generally.* When used in this chapter, unless the context otherwise requires:
(1) "Attorney General" means the Attorney General of the State or his duly appointed deputy.

(2) "Agent" a. With respect to an agent of a broker-dealer or issuer, "agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents an issuer in effecting transactions in a security exempted by section 7309(a)(1), (2), (3), (10), or (11) of this title, effecting transactions exempted by section 7309(b) of this title, or effecting transactions with existing employees, partners, or directors of the issuer if no commission or remuneration is paid or given directly or indirectly for soliciting any person in this State, or an individual who represents an issuer or a member of a bona fide agricultural cooperative whose securities are exempt from registration under section 7309(a)(12) of this title. A partner, officer, or director of a broker-dealer or issuer, or a person occupying similar status or performing similar functions, is an agent only if he otherwise comes within this definition.

b. With respect to an agent of an investment adviser, "agent" means any individual who acts on behalf of an investment adviser in providing investment advice, obtaining compensation, or otherwise representing the adviser in a transaction or communication with a client or prospective client. An individual who is specifically excluded from the definition of "investment adviser" in paragraph (6) of this subsection is not an agent.

(3) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Broker-dealer" does not include:

a. An agent;

b. An issuer;

c. A bank, savings institution, or trust company that does not solicit securities clients or engage in retail securities business (other than as a trustee);

d. A person who has no place of business in the State if he effects transactions in this State exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other broker-dealers, or (iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940 [CCH FEDERAL SECURITIES LAW REPORTER ¶47,307], pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees.

e. An issuer or an individual who represents an issuer or a member of such issuer provided said issuer is exempt from registration under §7309(a)(12) of this title.

(4) "Commissioner" means the Securities Commissioner, the principal executive officer of the Division of Securities designated in §7325 of this title.

(5) "Fraud," "deceit," and "defraud" are not limited to common-law deceit.

(6) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in purchasing or selling securities, or

who, for compensation and as part of a regular business, issues or promulgates analysis or reports concerning securities. "Investment adviser" does not include:

a. A bank, savings institution, or trust company;

b. A lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his profession and who receives no special compensation for them;

c. A broker-dealer whose performance of these services is solely incidental to the conduct of his business as a broker-dealer and who receives no special compensation for them;

d. A publisher or any bona fide newspaper, news magazine, or business or financial publication of general, regular and paid circulation;

e. A person whose advice, analysis, or reports relate only to securities exempted by §7309(a)(1) of this title;

f. A person who has no place of business in this State if his only clients in this State are other investment advisers, broker-dealers, banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or

g. Such other persons not within the intent of this paragraph as the Commissioner may by rule or order designate.

(7)"Issuer" means any person who issues or proposes to issue any security.

(8) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

(9) "Person" means an individual, a corporation, a partnership, an association, a joint stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

(10) "Promoter" includes:

a. Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes the initiative in founding and organizing the business or enterprise of an issuer;

b. Any person who, in connection with the founding or organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.

(11) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.

a. "Offer" or "offer to sell" includes every attempt to offer or dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

b. A purported gift of assessable stock is considered to involve an offer and sale.

c. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every ~~sale or offer~~ of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.

d. The term defined in this subsection do not include any bona fide pledge or loan; any stock dividend whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by stockholders for the dividend other than the surrender of a right to a cash or property dividend when each stockholder may elect to take the dividend in cash or property or in stock; any act incident to a vote by stockholders or approval pursuant to Section 228 of Title 8 without a meeting, pursuant to the certificate of incorporation or the provisions of this title, on a merger, consolidation, reclassification of securities, dissolution or sale of corporate assets in consideration of the issuance of securities, dissolution, or sale of corporate assets of another corporation; or any act incident to a judicially approved reorganization in which a

security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash.

(12) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility Holding Company Act of 1935," and "investment Company Act of 1940" means the federal statutes of those names as amended before or after the effective date of this chapter.

(13) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; including pyramid promotion which includes any plan or operation for the sale or distribution of property, services, or any other thing of value wherein a person for a consideration is offered an opportunity to obtain a benefit which is based in whole or in part on the inducement, by himself or others, of additional persons to purchase the same or a similar opportunity; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such title or lease; options or commodities; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in temporary or interim certificate, for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of the aforegoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or for some other specified period.

(14) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

(15) "Public interest" means that it shall appear to the Commissioner that the action take or sanction imposed will further the purpose of the Delaware Securities Act.

(b) *Principles of definition.* (1) In this chapter when the word "means" is employed in defining a word or term, the definition is limited to the meaning given.

(2) In this chapter when the word "includes" is employed in defining a word or term, the definition is not limited to the meaning given, but in appropriate cases the word or term may be defined in any way not inconsistent with the definition given.

(3) If a word used in this chapter is not defined herein, it has its commonly accepted meaning and may be defined as appropriate under §7325(b) of this title.

Sec. 7303. Fraud. It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:
(1) To employ any device, scheme, or artifice to defraud;
(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.
[Sec. 7301 last amended by Laws 1991, Ch. 181, approved July 17, 1991, effective August 16, 1991.]

Gordon GUND, Plaintiff-Appellee, Cross-Appellant,

v.

FIRST FLORIDA BANKS, INC., formerly, First Financial Corporation, Defendant-Appellant, Cross-Appellee.

No. 82-3144

United States Court of Appeals, Eleventh Circuit.

March 5, 1984.

Cite as 726 F.2d 682 (1984)

Corporate inside commenced actions seeking declaratory judgment that statute governing short-swing trading by insiders was not applicable to his sales of debentures and purchases of common stock. Issuer counterclaimed, seeking recovery of insider's short-swing profits. The United States District Court for the Middle District of Florida, William Castagna, J., entered summary judgment in favor of issuer. Issuer appealed from calculation of award and insider cross-appealed from both final judgment calculating award and district court's initial opinion and order on liability. The Court of Appeals, Fay, Circuit Judge, held that: (1) sale by insider of convertible security followed within six months by purchase of underlying conversion security, constituted short-swing transaction controlled by securities statute, and (2) profit calculation which limited "profits" attributable to short-swing transactions to six month period surrounding transaction was proper measure of recovery.

Affirmed.

1. Securities Regulation.⊶ 53

When a transaction clearly falls within language of statute governing short-swing trading by insiders, pragmatic approach to application of statute, under which only those transactions that are susceptible of abuse are found to be within statutory scope, is not applicable. Securities Exchange Act of 1934, § 16(b), 15 U.S.C.A. § 78p(b).

2. Securities Regulation. ⊶ 53

Sale by insider of convertible security, followed within six months by purchase of underlying conversion security, constituted short-swing transaction controlled by securities statute notwithstanding fact that two different classes of equity securities were involved which were allegedly not trading in relation to one another. Securities Exchange Act of 1934, § 16(b), 15 U.S.C.A. § 78p(b).

3. Securities Regulation. ⊶ 154

Profit calculation which limited "profits" attributable to series of short-swing transactions involving sale by insider of convertible security and almost simultaneous purchase of underlying conversion security to difference between actual purchase price of underlying security and highest market price of such security within six months before or after date on which convertible security was sold was a proper measure of recovery. Securities Exchange Act of 1934, § 16(b); 15 U.S.C.A. § 78p(b).

Claude H. Tison, Jr., Tampa, Fla., for defendant-appellant, cross-appellee.

Thomas C. MacDonald, Jr., John I. Van Voris, Raymond T. Elligett, Jr., Tampa, Fla., for plaintiff-appellee, cross-appellant.

Appeals for the United States District Court for the Middle District of Florida.

Before FAY and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

FAY, Circuit Judge:

Cross-appellant, Gordon Gund, a director of First Florida Banks, Inc. ("First Florida") since 1971, acquired in 1972 and 1973 substantial blocks of First Florida convertible subordinated debentures. The debentures were convertible into shares of First Florida common stock at a predetermined ratio. During an eight-

month period in 1976 and early 1977, Gund engaged in a series of transactions by which he sold his entire First Florida debenture holdings and purchased a large amount of First Florida common stock.

Gund commenced this action in the United States District Court for the Middle District of Florida on April 25 1977, seeking a declaratory judgment pursuant to 28 U.S.C. § 2201 (1976) that section 16(b) of the Securities and Exchange Act of 1934, 15 U.S.C. 78p(b) (1976)("1934 Act"), was not applicable to his sales of debentures and purchases of common stock. First Florida counterclaimed, seeking recovery of Gund's short-swing profits under section 16(b). Cross-motions for summary judgment were filed. The district court granted First Florida's motion, entering an opinion and order on January 20, 1982 holding that section 16(b) controlled Gund's transactions. The district court on September 29, 1982 entered a supplemental opinion addressing the calculation of damages and the final judgment based thereon, in favor of First Florida against Gund in the amount of $29,084.10. First Florida appealed from the final judgment and Gund cross-appealed from both the judgment and the district court's initial opinion and order on liability. We agree with the district court that section 16(b) controls the transactions at issue here and that the court's calculation of profits recoverable by First Florida is proper under the statute. We therefore affirm the district court's grant of summary judgment as to both liability and profit computation.

This appeal raises two issues: (1) whether the sale by an insider of a convertible security followed within six months by the purchase of the underlying conversion security, constitutes a short-swing transaction controlled by section 16(b) notwithstanding the fact that two different classes of equity securities are involved which are allegedly not trading in relation to one another; and (2) whether a profit calculation which limits the "profits" attributable to a series of short-swing transactions and thus are recoverable by the issuer of the securities to the six-month period surrounding the transactions is a proper measure of recovery under section 16(b).

I. FACTUAL BACKGROUND.

Our presentation of the facts is gleaned from the parties' stipulation of facts submitted in conjunction with their cross-motions for summary judgment. Because no factual disputes are

involved, our review is limited to a consideration of whether the district court correctly applied the 1934 Act to Gund's transactions.

First Florida, registered as a bank holding company with the Securities & Exchange Commission ("SEC" or "the Commission"), has issued two types of equity security; common stock, consisting of 11,713,645 outstanding shares, and a series of 6¾ % convertible subordinated debentures. The debentures issued in denominations of $1,000, were originally sold to the public in December, 1971 at par[1] and are freely convertible into shares of First Florida common stock at a conversion price of $12.125 per share. Thus, each $1,000 debenture can be converted into 82.47 shares of Fist Florida common stock. Both the common stock and the debentures are publicly traded in the over-the-counter market.

Gund became a director of First Florida in 1971 and has since continuously served in that capacity. Although it is stipulated that Gund was not a "controlling person" of First Florida within the meaning of the 1934 Act and that Gund did not take advantage of inside information in effecting any of the transactions at issue, he is conceededly an "insider" for section 16(b) purposes.[2] At various times during 1972 and 1973, Gund purchased debentures which had an aggregate face value of $605,000. Gund was also the direct and beneficial owner of 109,127 shares of First Florida co. mon stock. His debenture holdings remained unchanged until 1976.

During the 1970's, the market for the two classes of First Florida securities underwent severe upheavals. In 1971, the year the debentures were issued, through 1973, there was little change in the market for First Florida stock or debentures. Both traded near the levels implied in their offering prices, i.e., the debentures sold for roughly their face value and the stock traded in the neighborhood of $12. Beginning in early 1974, both the bond market and the market for First Florida bank stock had began a serious decline. By 1976, the

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1. As referenced herein, "par" represents the face amount of the debentures, namely $1,000.

2. An "insider" is "[e]very person who is direc'ly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security...or who is a director or officer of the issuer of such security..." 15 U.S.C. § 78p(a) (1976).

6¾ % debentures, due to increases in interest rates, were selling at about 75% of their face value; First Florida common stock had plunged by 50% selling for $6 per share or less.

In this market situation Gund engaged in a series of transactions, consummated at regular intervals from July, 1976 to March, 1977, by which he sold his entire bond holdings and used the proceeds to purchase approximately 77,000 shares of First Florida common stock.[3] Had Gund simply converted the debentures he would have received 49,895 shares of common stock. Thus by selling the debentures for cash and then purchasing common stock, Gund gained fifteen percent more stock than he would have through a simple conversion. Gund also bought 15,000 more shares of First Florida stock with new capital unrelated to the sale of the convertible debentures.

II. THE APPLICABILITY OF SECTION 16(b).

Gund contends that although his sales of debentures and purchases of common stock took place within the statutory six-month prohibition period, the transactions offered no possibility for short-swing profits based on inside information because the two classes of securities were not trading in relation to each other in the market.[4] As the possibility of the speculative abuse of inside information

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[3] The debenture sales and stock purchases can be summarized as follows:

DATE	DEBENTURES SOLD (SHARE EQUIVALENT)		NET SALE PROCEEDS	SHARES PURCHASED	PER SHARE COST	NET COST OF PURCHASE
2/18/76				10,000	5.8125	$58,125
7/19/76	100,000	(8247)	$75,000	10,000	6.125	$61,250
7/20/76				25,000	6	$15,000
8/ 9/76	100,000	(8247)	$75,000	12,500	6.125	$6,562.50
8/13/76	100,000	(8247)	$75,000	12,500	6.125	$76,562.50
8/25/76	100,000	(8247)	$75,000	12,500	6	$75,000
9/ 1/76				2,500	5.625	$14,062.50
3/2/77	205,000	(16,907)	$164,000	30,000	6.125	$183,750
	605,000	(49,895)	$464,000	92,500		$560,312.50

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[4] Specifically, Gund alleges that the debentures were selling as fixed price debt securities during the relevant period and that their price was influenced solely by fluctuation in interest rates, with the conversion

which section 16(b) was drafted to prevent was not present, Gund argues the statute should not control his transactions. He maintains that his sales and purchases, considered in light of recent judicial decisions adopting a pragmatic approach to section 16(b), should thus not constitute a section 16(b) violation. We disagree.

Section 16(b) provides, *inter alia*, that:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, and profit realized by him from any purchase and sale, or any sale and purchase, or any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months....

15 U.S.C. § 78p(b)(1978).

Congress recognized that short-swing trading by insiders with advance, inside information would threaten the goal of the 1934 Act to "insure the maintenance of fair and honest markets." 15 U.S.C. § 78(b) (1976). Insiders could exploit information not generally available to others to secure quick profits. As the Supreme Court has noted, "the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was

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feature of the debentures rendered meaningless due to the drastic drop in the market price of the common stock. Gund argues that the factors which would affect common stock prices could therefore not affect debenture prices, and vice versa. Thus, Gund's sales and purchases were not "matching transactions" so as to give rise to the type of short-swing profits addressed by section 16(b). Although we have serious doubts as to whether the market fluctuations of a convertible security and its underlying conversion security can *ever* insulate the securities from abusive short-swing transactions by insiders with the "right" type of inside information, we do not need to decide this question here.

believed to be intolerably great." *Reliance Electric Co. v. Emerson Electronic Co.*, 404 U.S. 418, 422, 92 S.Ct. 596, 602, 30 L.Ed.2d 575 (1972).

The flat prohibition of a certain class of transactions, embodied in section 16(b), is a rather uncommon regulatory mechanism. Unlike other remedial provisions of the 1934 Act, the most noteworthy being section 10(b), 15 U.S.C. § 78j(b) (1976), Congress drafted section 16(b) as an objective rule, designed to have a clearly "prophylactic" effect. *Blau v. Lehman*, 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403 (1962). To ensure that section 16(b) efficaciously put an end to unfair inside trading, Congress explicitly did not condition the section's application on proof on an insider's intent to trade on a short swing. "In short, this statute imposes liability without fault within its narrowly drawn limits." *Foremost-McKesson Inc. v. Provident Securities Co.*, 423 U.S. 232, 251, 96 S.Ct. 508, 519, 46 L.Ed.2d 464 (1976).

Although this "objective" approach has been consistently applied since the 1934 Act's inception to transactions which fall literally within the statutory language, several courts have recently attempted to interpret section 16(b) for situations which do not obviously fall within its scope. Because of section 16(b)'s mechanical effect, some courts have hesitated to construe "border-line" transactions as under its scope when congressional intent is unclear and the transaction in question is not of a type giving rise to speculative abuse. Under this "subjective" or "pragmatic" approach, an initial determination is made as to whether a transaction falls within the literal language of section 16(b). If an ambiguity is apparent, the inquiry becomes whether the transaction involved carries a potential for inside abuse. Only those transactions which are susceptible of abuse are found to be within the statutory scope. The vast majority of cases in which the pragmatic approach has been followed involve involuntary transactions which are triggered by a corporate reorganization; the courts have typically found such transactions to be not clearly encompassed within the statutory definitions of "purchase" and "sale." *See e.g. Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 593-95, 93 S.Ct. 1736, 1744-45, 36 L.Ed.2d 503 (1973) (sales in context of blocked tender offer outside of section 16(b) prohibitions); *Heublein Inc. v. General Cinema Corp.*, 722 F.2d 29 at 30-31 (2d Cir.1983) (involuntary exchange of stock by statutory insider for shares in the

survivor of a corporate merger not prohibited by section 16(b)); *cf. Texas International Airlines v. National Airlines Inc.*, 714 F.2d 533 (5th Cir.1983) (narrow "unorthodox transaction" exception to absolute liability in hostile takeover context inapplicable where putative insider voluntarily made cash-for-stock sale within statutory six-month period); *Kay v. Scientex Corp.*, 719 F.2d 1009 (9th Cir.1983) (overissuance of stock by corporation to insider considered a purchase under section 16(b) since parties voluntarily engaged in short-swing sale.)[5]

[1] Gund urges that his debenture sales and stock purchases should be analyzed under such a pragmatic approach, and that under such an analysis his transactions contain no potential for insider abuse. However, the law is clear that the pragmatic approach is used to determine the boundaries of section 16(b)'s definitional scope *only* in borderline situations, particularly those involving unorthodox transactions. *Kern County Land Co.*, 411 U.S. at 594-95, 93 S.Ct. at 1744-45. When a transaction clearly falls within the statutory language, the pragmatic approach is not applicable. *Mouldings Inc. v. Potter*, 465 F.2d 1101, 1104-05 (5th Cir.1972), *cert. denied*, 410 U.S. 929, 93 S.Ct. 1368, 35 L.Ed.2d 591 (1973);[6] *Tyco Labratories Inc. v. Cutler Hammer Inc.*, 490 F.Supp. 1, 7(S.D.N.Y. 1980).

[2] We have no doubt that section 16(b) literally applies to Gund's transactions.[7] Gund has stipulated to every element of section 16(b)

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5. See also *Foremost-Mckesson Inc. v. Provident Securities Co.*, 423 U.S.232, 252, 96 S.Ct. 508, 520, 46 L.Ed.2d 464 (1976) (person must be 10% owner prior to purchase at issue); *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 424 n. 4, 92 S.Ct. 596, 600 n. 4, 30 L.Ed.2d 575 (1972) (person must be 10% owner at time of sale at issue).

6. Fifth Circuit decisions handed down prior to October 1, 1981, are binding precedent upon this court, unless reversed by this court sitting *en banc*. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

7. Although not necessary to our disposition of the case, we note that the SEC has specifically interpreted section 16(b) to include within its prohibitions the very type of transactions at issue here. Recognizing the inflexibility of the flat prohibition embodied in section 16(b), Congress incorporated in the 1934 Act exemptive powers with regard to section 16(b). *See* 15 U.S.C. § 78p(b) (1976). The SEC was given the power to exempt any type of transaction from section 16(b) coverage if, in the

liability. It is undisputed that the transactions were sales and purchases, respectively, of the convertible and conversion securities. Gund acknowledges that they are equity securities and that he is an insider with respect to First Florida. The sales and purchases were never separated by more than one day and were sometimes simultaneous. There is, simply, no ambiguity to resolve. The transactions present no element of liability that would require a pragmatic approach, or any other analysis, to determine its presence. We thus do not even undertake a pragmatic approach analysis as to whether Gund's transactions were susceptible of insider abuse. Since there is no ambiguity as to whether the literal language of section 16(b) applies to these transactions, any contention by Gund that the statute should not encompass his 1976 and 1977 sales and purchases must be made to Congress, not to the courts.

Commission's judgment, the transaction does not open itself to insider abuse. The Commission has utilized its rulemaking powers on several occasions to grant exemptions, including an exemption for a limited class of conversion transactions. SEC Rule 16b-9, adopted in 1967, provides that:

> Any acquisition or disposition of an equity security involved in the conversion of an equity security which, by its terms or pursuant to the terms of the corporate charter or other governing instruments, is convertible immediately or after a stated period of time into another equity security of the same issuer, shall be exempt from the operation of section 16b of the Act: *provided, however,* that this section shall not apply to the extent that there shall have been either (1) a purchase of any equity security of the class convertible (including any acquisition of or change in a conversion privilege) and a sale of any equity security of the class issuable upon conversion, or (2) a sale of any equity security of the class convertible and any purchase of any equity security issuable upon conversion (otherwise than in a transaction involved in such conversion or in a transaction exempted by any other rule under section 16(b) within a period of less than 6 months which includes the date of conversion.

17 C.F.R. § 240.16b-9(a) (1980).

This section exempts "pure conversions" from liability, but specifically denies exemptions to transactions involving the sale of a convertible security and the purchase of the conversion security. Although the Commission's interpretative rules are not binding authority upon the federal courts, the exemption embodied in Rule 16b-9 is consistent with our conclusion that Gund's transactions were intended to be prohibited by the statute.

III. THE PROFIT COMPUTATION METHOD.

Both Gund and First Florida challenge the profit calculation employed by the district court. The district court calculated Gund's profits by using a computation suggested by SEC Rule 16b-6(b). This rule is designed to calculate profits from a sale of securities within six months of the exercise of an employee stock option. *See* 17 C.F.R. § 240.16b-6(b) (1980). In its supplemental opinion and order, the district court concluded:

> Under [Rule] 16b-6 the SEC, in order to alleviate the inherent unfairness of matching a sale at current market price with a purchase price established at a much earlier date when the option was granted, limits profits to the difference between the actual sales price and the lowest market price within six months before or after the sale date. The computation of profits in the instant case can be treated in a similar manner by matching the actual purchase price the plaintiff paid for the common stock with the highest market price of the common stock within six months before or after the date on which the debentures (convertible into common stock) were sold. Calculation of profit by this method yields a figure of $29,084.00...
> R. at E-42.

Gund urges that the profits should have been computed in the amount of $5,904.14, while First Florida urges a recovery of $164,643.12.[8]

The profit computation method most frequently utilized by courts in section 16(b) cases is that set forth long ago by the Second Circuit in *Smolowe v. Delendo Corp.*, 136 F.2d 231, *cert. denied*, 320 U.S.

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[8] Gund's figure of $5,904.14 is based on the presumption that because the debentures' price reflects their character as a fixed-return debt security as well as their conversion value, only a portion of the debentures' sales price should be considered in making the section 16(b) calculations. For the reasons which we stated above, the statute does not permit such speculation. First Florida calculates Gund's profits by considering the debentures' price and value since their purchase in 1972. This calculation, resulting in a figure of $164,643.12, directly conflicts with congressional intent that section 16(b) be a disgorgement statute only, and that security prices within six months surrounding Gund's transactions should therefore alone be considered.

751, 64 S.Ct. 56, 88 L.Ed. 446 (1943). *See Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir.1981); *Western Auto Supply Co. v. Gamble-Skogmo Inc.*, 348 F.2d 736, 742-43 (8th Cir.1965), *cert. denied*, 382 U.S. 987, 86 S.Ct. 556, 15 L.Ed.2d 475 (1966); *Morales v. Mylan Labratories Inc.*, 443 F.Supp. 778, 780 (W.D.Pa.1978); *Heli-Coil Corp. v. Webster*, 222 F.Supp. 831,837 (D.N.J.1963), *aff'd as modified on other grounds*, 352 F.2d 156 (3rd Cir.1965); *Arkansas Louisiana Gas Co. v. W.R. Stephens Investment Co.*, 141 F.Supp. 841, 847 (W.D.Ark.1956); *See also Ohio Drill & Tool Co. v. Johnson*, 498 F.2d 186, 194-95 (6th Cir.1974) (directing that *Smolowe* rule be used in profit computation under state insider trading statute). Under *Smolowe* rule, the highest sales price is matched with the lowest purchase price in any given six-month period in order to calculate the recoverable profit.

[3] Were we writing on a clean slate today, we might well conclude that a district court in a section 16(b) case should employ the *Smolowe* rule rather than utilize a method patterned after rule 16b-6. The district court's computation method yields a slightly different result from that calculated under the *Smolowe* rule. We, however, find either method to be consistent with the language and purpose of the 1934 Act. Both methods limit the profits recoverable in this type of case to those that accrued within the six-month period surrounding the short-swing transactions. Such a limitation is clearly consistent with the remedial, rather than punitive, nature of section 16(b). Accordingly, we uphold the district court's calculation of the amount recoverable by First Florida.

Finding that the district court properly found Gund's transactions to be controlled by section 16(b) and that the district court's profit computation method is consistent with the statute, we AFFIRM.